terns of violence observed there, will be used by the insurgents as propaganda to increase calls for violence against U.S. and Coalition personnel. I believe that if the responsive Darby Photos are released, riots, violence, and attacks by insurgents will result.

26. I am also concerned that, while the photos and videos taken together are illustrative only of isolated activity by one military unit, the members of which have been the subject of criminal investigations, prosecutions, and convictions,[1] their graphic and offensive nature makes it easy to falsely generalize from those images and characterize the abuse as more widespread than it was, and to impugn the United States Armed Forces as a whole, thereby generating a more vehement—and violent—reaction. The offensiveness of these images will make it more difficult to counteract calls for violence against U.S. and Coalition Forces despite the United States Government's immediate and forceful denunciation of the conduct portrayed in these photos, the numerous investigations into the activities and personnel they depict, and the criminal and military prosecution of those confirmed to be involved.

The Effect of the Responsive Darby Photos on the Predominantly Muslim Populations of Iraq and Afghanistan

27. Specifically, with respect to the video images described in paragraph 23, as common experience has shown and as viewing of the video clips has confirmed,

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[1] A separate addendum is attached that delineates the current status of disciplinary actions taken against those personnel who were involved in the abuse and mistreatment of detainees at Abu Grhaib [*sic*] some of which is depicted in the Darby photos.

video images are more powerful than still photographs. Video captures a continuum of action, shows cause-and-effect, and portrays the range of emotions of those depicted in a manner that a still photo—which is devoid of those dynamic qualities—fails to convey. The video images, thus, evoke a visceral and empathetic connection between the viewer and the person being victimized, and are much more likely to generate a violent reaction or be exploited by insurgents for violent ends.

28. Iraqi and foreign detainees have indicated that an important motivation for their fighting against the Coalition and U.S. forces is their perceived mistreatment of Iraqis at Abu Ghraib prison. Thus, for example, al Qaeda leader Abu Musab al-Zarqawi demanded the release of all female detainees as the sole condition for the release of American hostages Jack Hensley, Eugene Armstrong, and British hostage Kenneth Bigley, all of whom were subsequently beheaded. British hostage Margaret Hassan (who was also killed by her abductors) also pleaded in a video released by her captors for the release of female detainees.

29. Similarly, on February 28, 2005, a statement by the Media Wing of Abu-Mus'ab al Zarqawi-al-Qa'ida of Jihad Organization in the Land of the Two Rivers [Tanzim Qa'idat al-Jihad fi Bilad al-Rafidayn] was posted on various pro-Al-Qaeda Internet sites in which the group warned and reminded Muslims of the tactics of the enemies of Islam: "2. They have incarcerated our women in concentration camps, where they raped them and violated their honor . . . 3. They gave the rejectionists (Shi'a) access to our women, and the Ministry of Interior jails can testify to the fact. They gave them access to our Mosques, and their impudence reached the point

of writing on the Mosques' walls, 'Today [we take] your land, tomorrow [we will take] your honor, [rape your women].'"

Redaction of the Responsive Darby Photos Does Not Alter These Conclusions

30. Redaction of the responsive Darby Photos to obscure individuals' faces and identifying information and, where necessary, genitalia, does not change my opinion. Release of the photographs and videos, even in redacted form, will very likely lead to riots and violence across the Middle East, posing grave risk to both military forces and civilians.

31. This is because the privacy concerns of the detainees are separate and distinct from the inflammatory nature and offensiveness of the conduct depicted in the responsive Darby Photos—and thus the risk of harm to our personnel—which remains apparent despite redaction. Even with the images redacted, the abuses will be apparent. The official release of these graphic photos and videos depicting this type of behavior and abuse by U.S. military personnel will very likely incite violence and result in casualties, and redaction of the photographs and videos will not alleviate or lessen this risk.

Not Only the Responsive Darby Photos Themselves, But the Official Act of Releasing Them Could Lead to Harm to American Troops and Civilians

32. In my opinion, not only the images themselves, but also the official act of releasing the responsive Darby Photos could significantly harm U.S. interests and endanger U.S. personnel, as well as Iraqi and Af-

ghan civilians, police, and military personnel working in coordination with Coalition and NATO forces. Our democratic idea of public accountability—the airing of misdeeds by government officials and employees in order to hold government to the highest standards of conduct—is an idea that is misunderstood in other parts of the world. The insurgents likely will perceive and portray an official United States Government release of the Darby Photos as a deliberate tactic in the war and a conscious degradation to the dignity of Iraqis. While the acts of abuse were originally inflicted by rogue individuals acting illegally and contrary to U.S. policy, this official release will be perceived as the re-infliction of that degradation in full public view and under the full authority of the U.S. Government. Demagogues will be free to characterize the public disclosure of these images as further evidence of U.S. immorality and hypocrisy. Such a characterization by violent extremists will—in my opinion—put the lives of American troops and civilians in extreme danger. It also will fuel the efforts of extremists to generate or stimulate opposition to U.S. policies throughout the broader Middle East. It is likely to increase pressures on friendly governments in the region to distance themselves from the U.S. All this would be a serious setback to the U.S. Government's efforts to fight the War on Terrorism alongside mainstream Muslim allies and friends in the Middle East.

Release of Photographs That Were Previously Leaked to the Press Poses a Threat to the Safety of Troops and Civilians

33. As an initial matter, the photographs that were previously leaked were not officially released. An offi-

cial release by the United States Government lends an imprimatur—an official patina—that has never been attached to these photos.[2] As described above, many individuals in the Middle East will not understand that this official release is not an intentional effort to further ridicule and humiliate the individuals depicted, their culture, or their religion.

34. Before the *Newsweek* report of alleged Koran desecration, similar reports had been published by mainstream media publications. In particular, several media outlets previously reported that a Koran had allegedly been flushed down a toilet. Yet it was not until the *Newsweek* report cited a Government source, who appeared to confirm the reports, that the allegations touched off riots and death abroad. Similarly, official release of the responsive Darby Photos by the United States Government (even if some of the images had been leaked before to the press by unofficial sources) is bound to have a much different and more serious effect, different in kind from the prior unofficial release.

35. In addition, some of the previously released photographs have not been widely circulated. An official release of these photos significantly increases the chances that they will receive much greater circulation through publicly available channels and thereby inflame public

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[2] The United States Government has not previously released the responsive photos to the general public, but, as required by law, has provided relevant photos to civilian and military defense counsel in military courts-martial proceedings. Those disclosures have been subject to the requirements and proscriptions of the Military Rules of Evidence, the Rules for Courts-Martial, the Military Rules of Professional Conduct, and applicable military precedent.

sentiments and exacerbate tensions in sensitive geographic areas.

Sealing Portions of This Declaration

36. In some of the paragraphs of this Declaration, I provide descriptions of the records that are the subject of this litigation. The disclosure of the descriptions could reasonably be expected to endanger the lives and physical safety of persons described in paragraph 2, above. For that reason, I respectfully request the Court seal the following paragraphs: (the captions above paragraphs and) 21-23.

CONCLUSION

In light of the knowledge and information described herein, and given the provocative and offensive nature of the Darby Photos, I believe that the Darby Photos that I have identified in this declaration must be withheld in order to protect the lives of: members of the United States Armed Forces, forces operating in cooperation with the United States, and contractors operating with those forces; U.S. officials; Iraqi and Afghan police and military personnel working in coordination with our government and military forces; as well as to protect against the increased likelihood of violence against U.S. interests, personnel, and citizens worldwide.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ RICHARD B. MYERS
RICHARD B. MYERS

Date: Washington, D.C.
August 25, 2005

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civ. Action No. 04-CV-4151 (AKH)

AMERICAN CIVIL LIBERTIES UNION, ET AL., PLAINTIFFS

v.

DEPARTMENT OF DEFENSE, ET AL., DEFENDANTS

[Filed: Apr. 26, 2006]

FOURTH DECLARATION OF PHILLIP J. MCGUIRE

I, Phillip J. McGuire, declare as follows:

(1) I am the Director of the United States Army Crime Records Center ("USACRC"), U.S. Army Criminal Investigation Command ("CID") Fort Belvoir, Virginia. I have filed three previous declarations with the court in this matter (hereinafter "First McGuire Declaration", "Second McGuire Declaration" and "Third McGuire Declaration" respectively). This fourth declaration incorporates and supplements the information provided in my previous declarations.

PURPOSE OF THIS DECLARATION

(2) This declaration identifies and briefly describes photos withheld from CID documents provided to Plain-

tiffs, and provides justification for the withholding of 29 photos pursuant to FOIA exemptions (b)(6), (b)(7)(C) and (b)(7)(F).

IDENTIFICATION OF RESPONSIVE DOCUMENTS

(3) As stated in the First McGuire Declaration in paragraph 9, USACRC identified 198 CID Reports of Investigation (ROI) that were responsive to the requests of Plaintiffs in this matter. As of March 15, 2006, USACRC had processed and released all ROIs that were closed as of January 3, 2006 pursuant to the District Court's Order of January 10, 2006. Consistent with that Order, investigations in an open status as of January 3, 2006 were withheld (FOIA Exemption 7(a)). During the processing and release of the closed investigations, all pictures that contained images of individuals, regardless of status, were removed at DOD instruction for further processing. When photographs were removed from an investigation, Plaintiffs were provided with an insert page indicating that a photo maintained within the file at that location was not provided as it contained an image of an individual. A total of 358 photos were removed in this manner from the document releases provided by USACRC to Plaintiffs.

(4) In late 2005, USACRC applied the guidelines and criteria articulated by Judge Alvin K. Hellerstein at *in camera* proceedings on May 26, 2005 and August 9, 2005 to the 358 photos. Using this guidance, 329 photos were determined to be non-responsive and 29 photos were identified to Plaintiffs as responsive and withheld pursuant to FOIA exemptions (b)(6), (b)(7)(C) and (b)(7)(F). **Exhibit A** is a copy of the notification provided to Plaintiffs which identifies the photos by ROI number.

This notification inadvertently identified 28 responsive photos. The correct number is 29. These 29 photos are the subject of this Fourth McGuire Declaration and are collectively referred to in this declaration as "CID ROI Photos".

(5) The 29 photos at issue are maintained in seven CID ROI's. Each of the identified ROI's was processed and released to Plaintiffs. **Exhibit B**, attached, is an index which: identifies each photo by ROI number and date of release; describes the outcome of each ROI; identifies the location of the photo(s) within the ROI; and briefly describes each photo. I respectfully request that the photo descriptions within this exhibit be maintained under seal. **Exhibit C**, attached, describes in greater detail the nature of each ROI and the outcome of disciplinary or criminal actions taken, if any.

JUSTIFICATION OF FOIA EXEMPTIONS ASSERTED

(6) USACRC is asserting FOIA exemptions (b)(6), (b)(7)(C) and (b)(7)(F) to support the withholding of the 29 CID ROI Photos. All of these exemptions were asserted and defended in my previous three declarations, with respect to other photos and information. The justifications provided in the previous three McGuire declarations are asserted for the 29 CIO ROI Photos involved herein. Additional justification, specific to the photos at issue, is provided below.

EXEMPTIONS (b)(6) and (b)(7)(C)

(7) Unlike the content of many of the Darby photos (identified in my second and third declarations), the content of the 29 CID ROI Photos does not necessarily de-

pict criminal behavior. Many photos depict the normal processing and treatment of individuals captured during the course of the U.S. military operations in Iraq and Afghanistan. Some photos depict behavior that was determined to be inappropriate, but not criminal. All detainees pictured are clothed, mostly in their personal, civilian attire. Numerous military and U.S. government employees appear in the photos, both in uniform and in civilian-style clothing. None of the individuals who appear in the photos were prosecuted by courts-martial. Some received nonjudicial or administrative discipline.

(8) It is my determination that the individuals in the photos have an important expectation of privacy. As stated above, none of the United States military members, or other government employees, was convicted of a criminal offense with respect to the behavior represented by the photos. While some individuals most certainly engaged in misconduct, official misconduct alone does not obviate all expectations of privacy. United States military members, and other government officials operating in the theatre of war are targets for enemy aggressors. In this case, the images of these individuals, if released, will be published on the World Wide Web for viewing around the world. Government employees whose pictures are disseminated world-wide become easily identifiable, which puts the individuals, and their families back home, at much greater risk of attack, or harassment.

(9) It is also my determination that the privacy of the individual detainees justifies the withholding of the photos. The detainees depicted in these photos are wearing personal civilian clothing which, even with redactions of facial features, could be used to identify indi-

viduals. As explained in the declaration of Mr. Richard B. Jackson, the United States has an obligation to protect detainees from harassment and public curiosity. Incorporating Mr. Jackson's declaration herein, it is my opinion that the release and eventual world-wide dissemination of the photos identified by Mr. Jackson depicting certain individuals in detention would violate the privacy expectations of the detainees, as well as potentially compromise United States obligations for proper treatment of those detainees.

(10) Additionally, the public interest in the release of these photos does not outweigh the important privacy concerns of the individuals depicted. As initially stated in the First McGuire Declaration at paragraph 25, the determination of the public's interest in the disclosure of information is made by analysis of whether the information in question would inform the plaintiff or the general public about the agency's performance of its mission. In this case, the agency which holds the photos is CID Command. CID's stated mission is to conduct felony investigations into crimes that affect the persons and property of the U.S. Army. The release of these photos will in no way shed light on whether CID has adequately performed its mission to conduct investigations into the abuse of detainees. The CID ROI's which detail the entire investigations into the conduct depicted in each of the photos were released to Plaintiffs through this litigation (See release dates at Exhibit B). The pictures do not shed additional light into the agency's performance of its mission or the conduct described in the ROIs previously released to plaintiffs. Therefore, it is my analysis that the privacy interests of the individuals portrayed in the 29 CID ROI Photos outweigh any public interest in the release of the images.

EXEMPTION b(7)(F) INFORMATION WHICH COULD ENDANGER THE LIFE OF [*sic*] SAFETY OF THIRD PARTIES

(11) The First McGuire Declaration (para. 37) and the Second McGuire Declaration (paras. 8-14) have explained my basis for analysis and assertion of FOIA Exemption (b)(7)(F) to CID records withheld in this litigation. With respect to the assertion of this Exemption to the 29 CID ROI Photos, I incorporate herein the declaration of Brigadier General Carter F. Ham.

(12) Based upon the declaration and expertise of Brigadier General Ham and the previous declarations of General Myers and Ronald Schlicher, it is my determination that there is a great risk to civilians within the countries of Iraq and Afghanistan, as well as to U.S. forces located within those countries, if the 22 photos identified by Brigadier General Ham are released.

CONCLUSION

(13) For the foregoing reasons, I submit this declaration in support of the decision to withhold the set of 29 photos removed from CID ROI's previously provided to Plaintiffs, pursuant to FOIA exemptions (b)(6), (b)(7)(C) and (b)(7)(F).

Pursuant to 28 U.S.C. § 1746, I declare the foregoing to be true and correct.

Executed this 25th day of April 2006.

/s/ PHILLIP J. MCGUIRE
PHILLIP J. MCGUIRE
Director
U.S. Army Crime Records Center

EXHIBIT A

PHOTO PROCESSING
ACLU et al. v. DoD et al.

Applying the guidelines and criteria articulated by the Court *in camera*, photographic exhibits withheld from previously released Criminal Investigation Command (CID) Reports of Investigation (ROI) were processed.

329 photographs in the below listed ROIs were determined to be non responsive.

0136-03-CID259-61187	0147-04-CID259-80210
0153-04-CID146-71446	0137-04-CID899-81702
0473-04-CID023-67329	0234-04-CID259-80271
0041-03-CID899-63500	0149-03-CID469-60209
0035-03-CID259-61144	0055-03-CID349-59657
0025-04-CID469-79635	0133-04-CID452-63629
0140-03-CID389-61697	0260-03-CID259-61229
0013-04-CID789-83982	0537-04-CID034-72601
0264-03-CID259-61231	0374-04-CID093-65446
0014-03-CID919-63732	0190-04-CID259-80234
0085-03-CID939-64011	0184-04CID259-80230
0046-03-CID899-63502	0011-04-CID469-79630
0114-02-CID369-23525	0232-04-CID259-80267

0011-04-CID679-83487	0573-04-CID023-67403
0100-04-CID452-63608	0139-03-CID469-60206
0040-04-CID469-79638	0139-04-CID789-83995
0140-04-CID259-80204	0262-04-CID259-80294

28 photographs in the below listed ROIs were determined to be responsive and are withheld, consistent with the Darby photographs currently on appeal, under FOIA Exemptions 6, 7c, and 7f.

0153-04-CID146-71446
0353-03-CID093-45256
0100-04-CID452-63608
0384-04-CID023-67275
0133-04-CID452-63629
0374-04-CID093-65446
0190-04-CID-259-80234

ACLU et. al. v. DOD et. al. 04-4151 (S.D.N.Y.) (AKH)
Exhibit B, Fourth Declaration of Phillip J. McGuire

Index #	*ROI #/ Release Date*	*Description of ROI*	*ROI Photo Page #*	*Photo Description*
TAB A-1	0153-04-CID146-71446/27Oct04	Unfounded maltreatment of detainees at unknown locations in Afghanistan on 07Nov02--30Jun03	013	REDACTED-- FILED UNDER SEAL
A-2			014	REDACTED-- FILED UNDER SEAL
A-3			015	REDACTED-- FILED UNDER SEAL
A-4			017	REDACTED-- FILED UNDER SEAL
A-5			019	REDACTED-- FILED UNDER SEAL
A-6			020	REDACTED-- FILED UNDER SEAL
A-7			022	REDACTED-- FILED UNDER SEAL
A-8			023	REDACTED-- FILED UNDER SEAL
B-1	0353-03-CID093-45256/1Dec04	Unfounded cruelty and maltreatment of detainees at Camp Red, Baghdad, Iraq on 25Apr03--15Aug03	19	REDACTED-- FILED UNDER SEAL
B-2			21	REDACTED-- FILED UNDER SEAL
C-1	0010-04-CID452-63608/1 Dec 04	Alleged maltreatment of detainee at US Forces Safehouse, Al-Quaim, Iraq on 01Aug03--31Mar04	049	REDACTED-- FILED UNDER SEAL
D-1	0384-04-CID023-67275/15 Dec 04	Founded conspiracy, fail to obey, cruelty/maltreatment at Div. Central Collection Point, Iraq, 21 Dec 03	0007	REDACTED-- FILED UNDER SEAL
E-1	0133-04-CID452-63629/28 Jan 05	Founded dereliction of duty, assault (one soldier), agg. assault unfounded, FB Tycze Dae Rah Wod, Afghanistan, 5 Dec03--29 Feb 04.	8	REDACTED-- FILED UNDER SEAL
E-2			9	REDACTED-- FILED UNDER SEAL
E-3			10	REDACTED-- FILED UNDER SEAL
E-4			22	REDACTED-- FILED UNDER SEAL

E-5			23	REDACTED-- FILED UNDER SEAL
E-6			24	REDACTED-- FILED UNDER SEAL
E-7			25	REDACTED-- FILED UNDER SEAL
E-8			26	REDACTED-- FILED UNDER SEAL
E-9			27	REDACTED-- FILED UNDER SEAL
E-10			28	REDACTED-- FILED UNDER SEAL
E-11			29	REDACTED-- FILED UNDER SEAL
E-12			30	REDACTED-- FILED UNDER SEAL
E-13			31	REDACTED-- FILED UNDER SEAL
F-1	0374-04-CID093-65446/26 Feb 26	Unfounded assault, Iraq, 13 Jun 03--13 Jun 04	31	REDACTED-- FILED UNDER SEAL
F-2			31	REDACTED-- FILED UNDER SEAL
G-1	0190-04-CID-259-80234/15 Sep 05	Unfounded agg. Assault, cruelty/maltreatment, BIAP, Iraq, 4-11 Mar 04.	0056	REDACTED-- FILED UNDER SEAL
G-2			0057	REDACTED-- FILED UNDER SEAL

EXHIBIT C

Background Information on 29 Responsive Photos

All investigations triggered by allegations of detainee abuse/mistreatment.

Tab A (8 images). Images in unknown locations within Afghanistan, between 7 Nov 2002 and 30 Jun 2003. Investigation did not establish probable cause to believe that any detainee abuse occurred; images did not reveal detainee abuse or mistreatment.

TAB B (2 images). Images at Camp Red, Iraq, between 25 Apr 2003 and 15 Aug 2003. Investigation resulted in insufficient evidence to prove or disprove detainee abuse or mistreatment. Investigation further revealed that Camp Reds Standard operating procedure for detainees who became violent were to separate them from other detainees, tie hands behind them, and cover their heads with empty sandbags as a security measure to ensure that they did not harm themselves or others.

TAB C (one image). U.S. Forces safe house, Al-Quaim, Iraq, between 1 Aug 03 and 31 Mar 04. Investigation established probable cause that soldier committed aggravated assault when he pointed pistol at EPW he was guarding in Iraq. The soldier was found not guilty in non-judicial punishment proceedings under Article 15, Uniform Code of Military Justice (U.C.M.J.).

TAB D (one image). Division Central Collection point, Iraq, 21 Dec 03. Probable cause to believe that four soldiers committed offenses of conspiracy, fail to obey a lawful general order, and cruelty and maltreatment when they staged and posed for an inappropriate photo-

graph with detainees. No evidence that an assault occurred using the broom. Three soldiers received punishment under Article 15, U.C.M.J. proceedings. One soldier received a reprimand.

TAB E (13 images). Fire Base Tycze, Dae Rah Wod, Afghanistan, between 5 Dec 03 and 29 Feb 04. Investigation revealed that guards detailed to secure and protect detainees, jokingly pointed weapons at the bound detainees and took photos of the activity. Probable cause to believe that 8 soldiers committed the offense of dereliction of duty, but aggravated assault unfounded because of insufficient evident [*sic*] that the detainees were in fear for their lives, or of grievous bodily harm, or were even aware weapons were being pointed at them. There was probable cause to believe that one soldier committed assault when he struck a bound detainee in the back of the head. The soldiers involved received punishment under Article 15, U.C.M.J. proceedings.

TAB F (2 images). Iraq, various places, between 13 Jun 03 and 13 Jun 04. The so-called "Ramadi Madness" images produced by members of B Co., 1/124th Infantry Reg., FLARNG. Investigation revealed that while inappropriate, none of the images depicted criminal conduct. The investigation indicates that the two still photos were staged.

TAB G (2 images). Baghdad International Airport (BIAP), Iraq, between 4 Mar 2004 and 11 Mar 2004. Detainee depicted in images claimed he was abused while detained by U.S. Forces at Al Baghdadi and BIAP. Insufficient evidence to prove or disprove the detainee's abuse allegations.

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 04 Civ. 4151 (AKH)

AMERICAN CIVIL LIBERTIES UNION, CENTER FOR CONSTITUTIONAL RIGHTS, PHYSICIANS FOR HUMAN RIGHTS, VETERANS FOR COMMON SENSE AND VETERANS FOR PEACE, PLAINTIFFS

v.

DEPARTMENT OF DEFENSE, AND ITS COMPONENTS DEPARTMENT OF ARMY, DEPARTMENT OF NAVY, DEPARTMENT OF AIR FORCE, DEFENSE INTELLIGENCE AGENCY; DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF JUSTICE, AND ITS COMPONENTS CIVIL RIGHTS DIVISION, CRIMINAL DIVISION, OFFICE OF INFORMATION AND PRIVACY, OFFICE OF INTELLIGENCE POLICY AND REVIEW, FEDERAL BUREAU OF INVESTIGATION; DEPARTMENT OF STATE; AND CENTRAL INTELLIGENCE AGENCY, DEFENDANTS

[Filed: Apr. 26, 2006]

DECLARATION OF CARTER F. HAM

Carter F. Ham, pursuant to 28 U.S.C. sec. 1746, declares as follows:

1. I am a Brigadier General in the United States Army. I am currently the Deputy Director for Regional Operations (DDRO) of the Operations Directorate on the Joint Staff at the Pentagon. The DDRO is the principal advisor to the Director for Operations, J-3, of the Joint Staff for operational matters outside of the continental United States. As such, the DDRO coordinates and communicates frequently with the staffs of US Central Command, US European Command, US Pacific Command and US Southern Command to ensure combatant command concerns are addressed by the Joint Staff. The DDRO develops and coordinates operational orders and, once the Secretary of Defense approves such orders, communicates operational orders to the combatant commands. Additionally, the DDRO manages the Global Force Management system, which, in close coordination with US Joint Forces Command, US Transportation Command and US Strategic Command, ensures the highest priority combatant command requirements are met most effectively and efficiently. The DDRO maintains oversight of the National Military Command Center. In performing my duties as DDRO, I routinely confer with and obtain advice from combatant commanders' staffs regarding the operational requirements of their commands; I evaluate and synthesize this information; and I advise and make recommendations to the Chairman of the Joint Chiefs of Staff through the Director of Operations and other members of the Joint Staff.

2. Through the exercise of my official duties and as a result of my personal knowledge, I am familiar with this civil action and with Plaintiffs' requests for information under the Freedom of Information Act. Further, I have reviewed the 29 photographic images that are identified in Exhibit B of the Fourth Declaration of Philip J.

McGuire (collectively referred to as the "Responsive Army Photos"). For the reasons set forth in this declaration, I have concluded that the official release of the images further identified below, even if redacted to obscure identifying information, could reasonably be expected to:

a. Endanger the lives and physical safety of the Soldiers, Sailors, Airmen, and Marines in the United States Armed Forces presently serving in Iraq and Afghanistan, as well as other U.S. officials, Coalition Forces allied with the United States, and contractors serving with these forces;

b. Endanger the lives and physical safety of Iraqi civilians at large, and police and military personnel of the democratic Iraqi Transitional Government working in coordination with the United States and Coalition Forces in support of Operation IRAQI FREEDOM;

c. Endanger the lives and physical safety of Afghan civilians at large, and police and military personnel of the Government of Afghanistan working in coordination with the United States and Coalition Forces operating in support of Operation ENDURING FREEDOM, NATO-led operations, and contractors serving with these forces;

d. Aid the recruitment efforts and other activities of insurgent elements, weaken the new democratic governments of Iraq and Afghanistan, and add radical pressures on several of our regional allies and friends; and

c. Increase the likelihood of violence against United States interests, personnel, and citizens worldwide.

THE BASES FOR MY CONCLUSIONS

3. My conclusions are based upon my years of service and experience in the United States military, the assessments and evaluations of the battlefield commanders responsible for Iraq and Afghanistan, and intelligence reports and assessments of Department of Defense subject-matter experts on the Middle-Eastern region. In performing my duties, I routinely rely on the views of our combat command operations staffs, intelligence synthesis and reports, and the assessments of subject matter experts. In formulating my conclusions concerning the Responsive Army Photos, I have used the same approach, types of resources, information, and experts. In particular:

a. I have served in the United States Armed Forces for more than 30 years at various levels of command and staff. I have served in my current position as Deputy Director of Regional Operations on the Joint Staff at the Pentagon since April 2005. From August 2003 through February 2005, I was Deputy Commanding General for Training and Readiness for the US Army's I Corps, which included duty as Commander, Multi-National Brigade Northwest, Operation IRAQI FREEDOM. In the period of January 2004 to February 2005, I also was the senior U.S. commander in Mosul, Iraq, responsible for all U.S. and Coalition operations in the northern provinces of Iraq. From August 2001 to July 2003, I served in Central Command, including deployment to Qatar with the Central Command Headquarters, for the

initial phases of Operation IRAQI FREEDOM. As a result of my experiences, I have intimate, extensive knowledge of our military forces and their capabilities, as well as of the conventional and unconventional forces and capabilities of the enemies arrayed against us.

b. As Deputy Director for Regional Operations, I receive and review daily operations briefings, reports and intelligence analyses from Central Command, the Joint Staff, the Defense Intelligence Agency, the Central Intelligence Agency and the National Security Agency. I oversee the Current Operations cell in the National Military Command Center, which is responsible for reporting real-time, worldwide events affecting national security and US interests. Given my familiarity with current Operation IRAQI FREEDOM / Operation ENDURING FREEDOM events, I frequently provide briefings to the Senate and House Armed Services Committees and Congressional Delegations traveling to Iraq and Afghanistan. In short, my job requires me to be an expert in worldwide current operations.

c. In reaching my conclusions, I have reviewed and relied upon the Second Amended Declaration of former Chairman of the Joint Chiefs of Staff, General Richard B. Myers, dated August 25, 2005, that was submitted to this Court regarding the so-called Darby photos. *See* Second Amended Declaration of Richard B. Myers, dated August 25, 2005, ¶¶ 2, 24-26.

d. With respect to this matter, I also have solicited and relied upon the assessments and recommendations of the following three individuals regarding

their views of the military implications of release of the Responsive Army Photos: 1) General John P. Abizaid, Commander, U.S. Central Command, who is the ultimate military Commander responsible for the geographical area that includes both Iraq and Afghanistan; 2) General George Casey, the commander of the Multi-National Forces-Iraq (the ultimate military commander in Iraq of the coalition armed forces); and 3) Lieutenant General Karl W. Eikenberry, Combined Forces Command Afghanistan (the ultimate military commander in Afghanistan of the coalition armed forces). Each of these three commanders, by virtue of their positions and responsibilities and their immediate visibility of the battlefield environment, have highly informed opinions that I have considered in this matter. Each of these three commanders agree with and support my conclusions about release of the Responsive Army Photos.

e. As I indicated above, I have also considered and relied upon the analysis and assessments of DOD resident subject-matter experts on the Middle-Eastern region.

OPERATION ENDURING FREEDOM AND OPERATION IRAQI FREEDOM

4. Following the attacks on the United States of September 11, 2001, the United States military, with the support of a worldwide coalition, launched Operation ENDURING FREEDOM to drive the oppressive Taliban regime—which provided comfort and support to al-Qaeda terrorists—from Afghanistan. As a result of that successful effort, the Taliban was removed from power, and on October 9, 2004, the Afghan people for the first

time ever selected their head of state, the president of Afghanistan, by democratic vote. Operation IRAQI FREEDOM was launched, again with the support of a worldwide coalition, to remove the dictatorial regime of Saddam Hussein from power, with the aim of ending an active threat to the safety of the U.S. and fostering the establishment of a democratic form of government in Iraq. Following a brief period when Iraq was led by a Coalition Provisional Authority, sovereignty of Iraq was transferred to an interim government, and democratically elected representatives of the Iraqi people are in the process of completing work on a national constitution. There is, however, more work to do. Insurgent elements in both Afghanistan and Iraq continue to attack the process of democratic transition in those countries by mounting violent and deadly assaults against the multinational forces that remain posted in the region in order to protect and defend those countries as they take their steps toward freedom. As part of the multinational commitment to strengthening and defending these emerging democracies, more than 23,000 U.S. troops remain on the ground in Afghanistan and over 132,000 U.S. troops are part of the ongoing mission in Iraq.

5. As General Myers' declaration sets forth in more detail, perceived mistreatment or humiliation of detainees in the custody of the United States Armed Forces has been exploited or misrepresented for violent ends in Iraq, Afghanistan and elsewhere in the Middle East. *See* General Myers' Decl. ¶¶ 8, 14-19, 24-29. A prime example of such violence was the rioting that occurred as a result of a *Newsweek* report—later retracted—of alleged abuse of the Koran by United States' personnel. *Id.* ¶¶ 14-19.

A. *Current Situation in Iraq*

6. The situation on the ground in Iraq remains dynamic and dangerous in Baghdad and several other parts of the country. It changes from day to day, and it varies from region to region. Insurgent attacks against Coalition Forces in Iraq average about 1,700 attacks per month. However, significant events can cause those levels to spike to approximately 2,500 insurgent attacks per month.

7. As General Myers' declaration makes clear, one of the goals of the insurgency is to use violence against innocent civilians to undercut the mission of the U.S. and Coalition forces, as well as the Iraqi Transitional Government, and to stop the transition to democracy in that country. Thus, the insurgents will use any means necessary to incite violence and, specifically, have and will focus on perceived U.S. or Coalition mistreatment of Iraqi civilians and detainees as a propaganda and recruiting tool to aid their cause.

8. For example, two British soldiers were killed and another was injured in Amarah, Iraq, by way of an Improvised Explosive Device in February 2006. Open sources linked these killings to recent use of a 2004 video of British soldiers beating Iraqi youths in the Amarah area. Amarah, which is located north of Basra in the British-controlled Maysan province, is dubbed the "Wild West" by British troops and has been the focus of heavy attacks by insurgents There had been warnings in the Arab media that there could be reprisals against British forces in the area as a result of the video. The warnings proved true. More than 1,000 protestors, many of them supporters of Shia cleric Muqtada al-Sadr,

gather and shouted slogans against the alleged abuse of the youths in Amarah. The release of the tape inflamed tensions and led to the ruling council of Maysan province making a public declaration that they would suspend cooperation with all British forces and officials. Members of Shiite political groups opposed to the U.S.-led coalition appeared to have engineered that move, apparently seeking to exploit public sensitivities after attempts by the British to be more aggressive with Shiite militias.

B. ***Current Situation in Afghanistan***

9. The situation on the ground in Afghanistan also remains volatile. In addition to the details set forth in General Myers' declaration, the most recent estimates indicate that there are about 250 insurgent attacks per month against the Coalition Forces, which forces operate in support of the Government of Afghanistan. The insurgency in Afghanistan relies heavily on aggressive information operations to turn perceived insult or deprecation towards Islam into causes for violent uprisings.

10. As noted in General Myers' declaration, when *Newsweek* incorrectly reported that U.S. military personnel at Guantanamo Bay, Cuba had desecrated the Koran, at least eleven people died and many were hurt during several anti-U.S. protests in Afghanistan. Open sources reported that two United Nations guest-houses were attacked, as were shops and government buildings. Two offices of international aid groups were destroyed. And uprising of Muslims was not limited to Afghanistan. Open sources reported that about 12,000 people gathered in Egypt, many of them supporters of the outlawed Muslim Brotherhood. About 30 people were injured

during that protest. A similar number gathered in Beirut, Lebanon, where the crowd carried black banners and burned American and Israeli flags. In Bangladesh's capital of Dhaka, about 5,000 people rallied after Friday prayers, spitting on U.S. flags and burning them. While doing so, they shouted "Death to America!" and "Destroy America!"

11. The recent reaction to re-publication of the Danish cartoon of the Prophet Muhammad is another example of images being used in information operations to stir violent reactions in Afghanistan. In January 2006, a Norwegian publication reprinted a Danish cartoon depiction of the Prophet Muhammad. As a direct result, open sources reported that at least eleven people were killed in Afghanistan, including two people who died when protesters turned on the U.S. airbase at Bagram. As a result of the cartoon, violence erupted elsewhere as well. Again, open sources reported that the cartoon sparked violence between Nigeria's Muslim and Christian communities, leaving nearly 150 people dead and thousands displaced after five days of violence. Five protestors were killed in Pakistan during demonstrations. One teenage boy died in Somalia after protestors attacked police. In Turkey—where U.S. forces are also stationed—a Catholic priest was killed, allegedly by a teenage shooter who was influenced by the cartoon. Protestors also attacked the Danish embassies in Iran, Syria and Lebanon. In addition to these violent reactions, open sources reported protests at many locations in reaction to the Muhammad cartoon.

THE RESPONSIVE ARMY PHOTOS

12. I have personally reviewed the 29 responsive photographic images that are identified in Exhibit B of the Fourth Declaration of Philip J. McGuire.

13. [SEALED]

14. [SEALED]

15. [SEALED]

16. [SEALED]

17. [SEALED]

CONCLUSIONS AFTER REVIEWING THE RESPONSIVE ARMY PHOTOS

18. Based on my review, I believe that official release of the 22 Responsive Army Photographs described in paragraphs 13-16 above will pose a clear and grave risk of inciting violence and riots against American troops and coalition forces. I also believe that release of the Responsive Army Photos will expose innocent Iraqi, Afghan, and American civilians to harm as a result of the insurgency's reaction, which will likely involve violence and rioting. It is probable that the insurgents and other groups will seize upon these images as grist for their propaganda mill, which will result in, besides violent attacks, increased terrorist recruitment, continued financial support, and exacerbation of tensions between the Iraqi and Afghan populaces and U.S. and Coalition Forces.

19. My opinion is based upon the information set forth in General Myers' declaration, including but not limited to the vitriolic and violent reaction to *Newsweek's* Koran report, as well as the updated assessment

of the conditions in Iraq and Afghanistan, which is informed by the violence arising out [*sic*] the publication of cartoons depicting the Prophet Muhammed and release of a British video depicting the mistreatment of Iraqi nationals. Release of these Responsive Army Photos will be portrayed as part of an alleged, continuing effort of the United States to humiliate Muslims and, given the patterns of violence observed there, will be used by the insurgents as propaganda to increase calls for violence against U.S. and Coalition personnel. I believe that if the Responsive Army Photos are released, riots, violence, and attacks by insurgents will result.

20. I am also concerned that, while the photographs are illustrative of isolated activity, their graphic and offensive nature will make it easy to falsely generalize from those images and impugn the United States Armed Forces as a whole, thereby generating a more vehement —and violent—reaction. The offensiveness of these images will make it more difficult to counteract calls for violence against U.S. and Coalition Forces.

Redaction of the Responsive Army Photos Does Not Alter These Conclusions

21. Redaction of the Responsive Army Photos to obscure individuals' faces and identifying information does not change my opinion. Release of the photographs, even in redacted form, will very likely lead to riots and violence in Iraq, Afghanistan and elsewhere in the Middle East, posing grave risk to both military forces and civilians. This is because the privacy concerns of the detainees are separate and distinct from the inflammatory nature of the images depicted in the Responsive Army Photos—and thus the risk of harm to our personnel—which remains apparent despite redaction.

Sealing Portions of This Declaration

22. In some of the paragraphs of this Declaration, I provide descriptions of the records that are the subject of this litigation, and I respectfully request that the Court seal the paragraphs 13-17.

CONCLUSION

In light of the knowledge and information described herein, and given the inflammatory nature of the Responsive Army Photos, I believe that the Responsive Army Photos that I have identified in this declaration must be withheld in order to protect the lives of: members of the United States Armed Forces, forces operating in cooperation with the United States, and contractors operating with those forces; U.S. officials; Iraqi and Afghan police and military personnel working in coordination with our government and military forces; as well as to protect against the increased likelihood of violence against U.S. interests, personnel, and citizens worldwide.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ CARTER F. HAM
CARTER F. HAM

Date: Washington, D.C.
April 26, 2006

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APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 06-3140-cv

AMERICAN CIVIL LIBERTIES UNION, ET AL.,
PLAINTIFFS-APPELLEES

v.

DEPARTMENT OF DEFENSE, ET AL.,
DEFENDANTS-APPELLANTS

[Filed: May 28, 2009]

DECLARATION OF GENERAL DAVID H. PETRAEUS

I, General David H. Petraeus, pursuant to 28 U.S.C. 1746, hereby declare as follows:

(U) 1. I currently serve as the Commander of United States Central Command (USCENTCOM). This Combatant Command was established by the President pursuant to Title 10, U.S. Code, Section 161. USCENTCOM seeks to promote cooperation, to respond to crises, to deter aggression, and when necessary, to defeat our adversaries in order to promote security, stability, and prosperity within the USCENTCOM

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Area of Responsibility (AOR). The USCENTCOM AOR stretches across more than 4.6 million square miles and 20 countries located through the Middle East and Central Asia, including Iraq, Afghanistan, and Pakistan. The statements in this declaration are based upon my personal knowledge and upon information made available to me in the performance of my official duties.

(U) 2. Through the exercise of my official duties and as a result of my personal knowledge, I am familiar with this civil action and have reviewed the 21 photographic images that the district court ordered released on 21 June 2006, and that are the subject of the appeal in ACLU v. Department of Defense, 543 F.3d 59 (2d Cir. 2008). I am also aware that in addition to the 21 images specifically addressed in the appeal before the Second Circuit, there is a substantial number of additional images that are responsive to the Freedom of Information Act request in this case. For the reasons set forth in this declaration, I have concluded that the official release of those images, even if redacted to obscure identifying information, could be reasonably expected to adversely impact current military, political, and civil efforts in the USCENTCOM AOR. In addition to fueling civil unrest, causing increased targeting of U.S. and Coalition forces, and providing an additional recruiting tool to insurgents and violent extremist groups, the destabilizing effect on our partner nations cannot be underestimated. Many of our partner nations in the region struggle with their populations' perceptions that they are merely instruments of the U.S. government and do not have their citizens' best interests at heart. These perceptions are directly fueled by extremist groups' expert

public affairs campaigns to win "hearts and minds" across the USCENTCOM AOR and to recruit new members. Nowhere are USCENTCOM's efforts to win this struggle, by strengthening the legitimacy and efficacy of host nation governments, more critical than in Pakistan, Afghanistan, and Iraq. The release of images depicting U.S. servicemen mistreating detainees in Iraq and Afghanistan, or that could be construed as depicting mistreatment, would likely deal a particularly hard blow to USCENTCOM and U.S. interagency counterinsurgency efforts in these three key nations, as well as further endanger the lives of U.S. Soldiers, Marines, Airmen, Sailors, civilians, and contractors presently serving there.

(U) 3. My conclusions are based on my years of service and experience in the United States military; intelligence and operations reports, as well as assessments of the situation in the USCENTCOM AOR, and Pakistan, Afghanistan and Iraq specifically; assessments and evaluations of my subordinate commanders; the declarations made previously in this case; and regular interaction with both military and civilian leadership of the nations in the USCENTCOM AOR. In particular:

a. (U) I have served in the United States Army for 35 years at various levels of command and staff. I have commanded at the battalion, brigade, division, Multi-National Force-Iraq (MNF-I) and theater levels, including at the two-, three-, and four-star levels in Iraq. My staff experience includes serving as the Executive Assistant to the Chairman of the Joint Chiefs of Staff; Aide to the Chief of Staff of the Army; Military Assistant to Supreme Allied Commander-Europe; Chief of

Operations of the United Nations Force in Haiti; and Assistant Chief of Staff for Operations of the NATO Stabilization Force in Bosnia.

b. (U) I have extensive experience in Iraq, including command at the division and theater levels. In addition to commanding Multi-National Force-Iraq (MNF-I) for over 19 months prior to taking command of USCENTCOM, I commanded the 101st Airborne Division (Air Assault), during the first year of Operation Iraqi Freedom. I was also the first commander of Multi-National Security Transition Command-Iraq from June 2004 to September 2005, and the commander of the NATO Training Mission-Iraq from October 2004 to September 2005. Prior to my tour as MNF-I commander, I commanded the U.S. Army Combined Arms Center and Fort Leavenworth, during the development and publication of both the U.S. Army Field Manual 3-24, *Counter-insurgency*, and U.S. Army Field Manual 2-22.3, *Human Intelligence Collector Operations*.

c. (U) As a result of this experience, I have intimate and extensive knowledge of our military forces and interagency partners and their capabilities, as well as those of the enemies who threaten U.S., Coalition, Iraqi, Afghan, and Pakistani forces and interests.

d. (U) As the Commander of USCENTCOM, I receive daily intelligence and operations briefings regarding the political, economic, diplomatic, and security environment in the countries in the USCENTCOM AOR, with particular emphasis on Pakistan, Afghanistan, and Iraq. These briefings are produced by sub-

ject-matter experts, and I rely on and trust their expertise and insights.

e. (U) I frequently travel throughout the USCENTCOM AOR to personally view the situation across the region. During these missions, I receive reports from subordinate operational and tactical commanders who provide insights from the local and regional levels. I also meet regularly with national political and military leaders.

f. (U) I reviewed and relied upon the Declaration of Brigadier General Carter F. Ham, dated April 26, 2006, and the Second Amended Declaration of the former Chairman of the Joint Chiefs of Staff, General Richard B. Myers, dated August 25, 2005, which were submitted to the district court regarding photos purporting to show detainee abuse.

g. (U) I strongly condemn any misconduct and abuse depicted in these images that were the responsibility of U.S. military personnel. I am committed to ensuring all detainees in the USCENTCOM AOR are treated humanely, and that any allegation of detainee mistreatment is immediately investigated and appropriate disciplinary action taken. In fact, as Commander of both MNF-I and USCENTCOM, I have repeatedly stressed that we must "live our values," and not only ensure U.S. servicemen treat detainees humanely, but that the nations we are assisting also do the same. Early on in our operations in Iraq in the late spring of 2003, I directed the 101st Airborne Division commanders to ensure observance of the Geneva Conventions regarding treatment of those we detained. As the Commander of

MNF-I, I directed MNF-I forces to intervene to stop abuse if it occurs, and to prevent abuse through education, training, and mentoring.

PAKISTAN

(U) 4. The need to establish a trusting, mutually beneficial U.S.-Pakistan partnership is pressing, yet the ability to do so is severely challenged by current events. The Government of Pakistan (GOP) faces a burgeoning threat from the Taliban, indigenous Pakistani militant groups, and foreign extremists in Pakistan's Federally Administered Tribal Areas (FATA) and Northwest Frontier Province (NWFP).

(U) 5. To counter this threat, Pakistan's Frontier Corps (FC) commenced security operations in the area in late-August 2008. Despite these efforts, which were undermined by a wavering commitment from the GOP, the security situation in Pakistan deteriorated further. The Taliban quickly came to control the entire Swat Valley in the NWFP. Pakistan's leaders became anxious to develop a means of restoring stability and order to the region. The GOP entered into peace talks with NWFP militants who proffered a diplomatic solution, including the implementation of Shari'a law within the Swat Valley and the Malakand Division. In exchange, the GOP agreed that the Pakistan Military would cease operations and the militants would lay down their arms.

(U) 6. This arrangement was short-lived, however, and disagreements quickly arose over the militants' immediate and brutal implementation of Shari'a law in Swat Valley. The militants resumed offensive operations and by late-April 2009, they had pushed to within

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60 miles of Islamabad, Pakistan's capital. As militant influence grew toward the urban heart of the country, the international community and civil society groups became increasingly alarmed, forcing the government to recognize the growing threat and deploy the Pakistan Military. While the current offensive by the Pakistan Military seems their most serious effort to date, enduring success against the militants has yet to be seen, and several hundred-thousand Pakistani civilians have been displaced in the latest fighting.

(U) 7. The stabilization of Pakistan via a strong partnership with the United States is critical. Violent Extremist Organizations (VEO), Al Qaeda (AQ) and the Taliban not only destabilize Pakistan, they undermine the regional stability necessary for fulfillment of U.S. goals in the region. Al Qaeda and Associated Movements (AQAM) use the ungoverned space of the FATA to plan for and train terrorists intent on attacking the U.S. and U.S. interests abroad, including sending fighters across the border into Afghanistan.[1] Even with new supplemental distribution networks, sustainment operations of U.S. forces in Afghanistan are highly dependent on air and ground routes through Pakistan. Separately, the security of the Pakistani nuclear arsenal is of concern, and it is not entirely inconceivable that a country like Pakistan, facing many complex problems, could deteriorate at a pace that would challenge their and our best capabilities to restore order.

(U) 8. Newly released photos depicting abuse of detainees in U.S. military custody in Afghanistan and Iraq

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[1] ~~(S)~~ [REDACTED]

would negatively affect the on-going efforts by Pakistan to counter its internal extremist threat. Anti-U.S. sentiment has already been increasing in Pakistan. Most polling data reflects this trend, especially in regard to cross-border operations and reported drone strikes, which Pakistanis perceive to cause unacceptable civilian casualties. In June 2008, 45% of Pakistanis said that U.S. presence in the region was a threat to Pakistan, and that jumped to 54% in October 2008. It may be higher today, and will certainly increase if new detainee abuse photos are released. Most Pakistanis also feel that U.S.-Pakistan cooperation does not "mostly benefit" Pakistan (2% in October 2008, down from 7% in June 2008). While other polling data show minor improvements in US-Pakistan relations, 63% of Pakistanis still oppose cooperating with the U.S. on counter-terror operations, and 35% say they do not support U.S. strikes into Pakistan, even if they are coordinated with the GOP and the Pakistan Military ahead of time. Preventing Pakistan-based militants from exacerbating strained U.S.-Pakistan tensions has been very difficult for the GOP in recent months and years. Release of images depicting, or that could be construed as depicting, U.S. forces abusing detainees who would likely be depicted as "fellow Muslims" would undermine this effort.

(U) 9. Based on historical precedents, such as the publication of Danish cartoons depicting the Prophet Mohammed in late 2005 and a Newsweek article erroneously highlighting desecration of the Koran by U.S. military members in 2006, civil unrest via spontaneous demonstrations in Pakistan's largest cities would be a likely result of publication of images depicting U.S. abuse of

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detainees in its custody in Iraq and Afghanistan. Militant and extremist groups would use these images to foment anti-U.S. sentiment and to incite demonstrators to conduct deliberate attacks against U.S. targets,[2] as well as western Non-Government Organization (NGO) facilities and personnel.[3]

~~(S)~~ 10. [REDACTED]

AFGHANISTAN

(U) 11. Afghanistan's nationwide violence is presently 95% higher than it was during this same period last year. The increase in violence is expected to continue throughout the summer following the conclusion of the spring poppy harvest. Fighters will refocus on conducting insurgent operations and additional U.S. forces will begin operations. Despite recent U.S. and International Security Assistance Force (ISAF) operations to disrupt insurgents in southern Afghanistan, insurgents continue planning for organized attacks against the provincial capitals of Helmand and Kandahar Provinces. The end of the poppy harvest in southern Afghanistan will likely lead to a significant increase in violence there, once again surpassing that of violence in all other regions.

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[2] ~~(S)~~ [REDACTED]

[3] ~~(C)~~ [REDACTED]

[4] (U) Release of detainee abuse images depicting, or that could be construed as depicting, U.S. forces abusing detainees in its custody in Iraq and Afghanistan could reasonably be expected to endanger the life or physical safety of diplomatic personnel via invigorated kidnapping and assassination attempts.

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(U) 12. Newly released photos depicting, or that could be construed as depicting, abuse of detainees in U.S. military custody in Iraq and Afghanistan would place U.S. servicemen in Afghanistan at heightened risk and corrosively affect U.S. relations with President Karzai's government, as well as further erode control of the Afghan government in general. Spontaneous demonstrations might occur in Kabul, Kandahar City, Mazar e Sharif and other population centers in Afghanistan. Public condemnations by Afghan leaders and insurgency leaders would be certain. An influx of foreign fighters from outside Afghanistan and new recruits from within Afghan [*sic*] could materialize, as the new photos serve as potent recruiting material to attract new members to join the insurgency. New photos would also serve to enhance fund-raising efforts for insurgent sympathizers across the Muslim world. Attacks against newly-arriving U.S. Marines and soon-to-arrive U.S. Army units in the south, and transitioning U.S. Amy units in the east, could increase, thus further endangering the life and physical safety of military personnel in these regions.

(U) 13. Attacks against Afghan offices and government leaders in Kabul and provincial capitals could also occur, as could attacks against the primary ground line of communication or disruption of the Northern Distribution Network. The Afghan presidential election cycle might also be disrupted. Indeed, Taliban and insurgent forces have stated that disrupting the 2009 presidential elections is one of their objectives. Release of the photos would make attacks and disruptions even more likely. Coordinated attacks focused on polling stations or destruction of votes could raise concerns over the valid-

ity of the elections, and any hint of improper elections would exacerbate perceptions that the Afghan government lacks legitimacy. Managing preparations for Afghanistan elections, while simultaneously enduring protests and public condemnations from Afghanistan leaders regarding detainee images and civilian casualties caused by U.S. air strikes, would make the situation very challenging for U.S. and ISAF forces. Perhaps most importantly, release of the photos could undermine U.S. goals in the region, particularly if Muslim sensitivities become inflamed and Muslim willingness to work with the U.S. is degraded, which would be likely with publication of photos depicting, or that could be construed as depicting, U.S. detainee abuse of detainees in its custody in Iraq and Afghanistan.

(~~S//~~REL [REDACTED]) 14. [REDACTED]

(~~S//~~REL [REDACTED]) 15. [REDACTED]

IRAQ

(U) 16. Iraq continues to sustain progress in security and stability, but the progress remains fragile and reversible. Despite security gains, Sunni and Shi'a extremists continue to pose threats to Iraq's security. While overall violence decreased significantly[5] in 2008, a string of high profile attacks aimed at Iraqi Shi'a in Baghdad, from late-March to early-May of this year, demonstrated the tenuous nature of Iraq's present security environment. These attacks highlight the lethality of small terrorist cells despite their reduced capacity. Shi'a extremist-related violence appears to be largely

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[5] ~~(S)~~ [REDACTED]

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focused against U.S. forces. The focus of the Sunni insurgency has been pushed into parts of Northen Iraq as Coalition forces, Iraqi Security Forces (ISF), and Sons of Iraq (SOI) have worked to limit Sunni insurgent freedom of movement. Meanwhile, Iraq's security responsibilities are in a period of transition as responsibilities shift from Coalition Forces to Iraqi Security Forces, per the terms of the Iraqi-US Security Agreement that went into effect on 1 January 2009.

(U) 17. Newly released photos depicting abuse, or that could be construed as depicting abuse, of Iraqis in U.S. military custody would inflame emotions across Iraq and trigger the same motivations that prompted many young men to respond to calls for jihad following the Abu Ghraib photo release. After the Abu Ghraib photos were publicized in 2004, there was a significant response to the call for jihad, with new extremists committing themselves to violence against U.S. forces. Al-Qaeda in Iraq (AQI) and Sunni insurgents groups in Iraq will likely use any release of detainee abuse images for propaganda purposes, and possibly as an opportunity to widen the call for jihad against U.S. forces, which could result in a near-term increase in recruiting and attacks. Anti-American and anti-Iraqi government protests can also be expected, with most of the anger likely directed towards the U.S. presence.[6] With national elections approaching later in the year, Iraqi politicians can be expected to use the detainee images as fodder for their campaigns, especially in response to anti-U.S. sentiment that may increase as elections draw near and

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[6] ~~(C)~~ [REDACTED]

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final U.S. withdrawal becomes more imminent. Additionally, pressure will mount on the Prime Minister to allow for a national referendum on the Security Agreement and the Strategic Framework Agreement.

(U) I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 27th May 2009.

/s/ DAVID H. PETRAEUS
DAVID H. PETRAEUS
General, U.S. Army
Commander, USCENTCOM4

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APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 06-3140-cv

AMERICAN CIVIL LIBERTIES UNION, ET AL.,
PLAINTIFFS-APPELLEES

v.

DEPARTMENT OF DEFENSE, ET AL.,
DEFENDANTS-APPELLANTS

[Filed: May 28, 2009]

DECLARATION OF GENERAL RAYMOND T. ODIERNO

I, General Raymond T. Odierno, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. (U) I am the Commander of Multi-National Force-Iraq (MNF-I). MNF-I is the strategic headquarters responsible for coalition operations in Iraq. I have served in the Iraq Theater of Operations (ITO) for 36 months in the past six years. The statements in this declaration are based upon my personal knowledge and upon information made available to me in the performance of my official duties. In relevant areas I will relate the views and opinions of senior Iraqi leaders.

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2. (U) Through the exercise of my official duties and as a result of my personal knowledge, I am familiar with this civil action and have reviewed the 21 photographic images ("the photos") that the district court ordered released on June 21, 2006, that are the subject of the appeal in *ACLU v. Department of Defense*, 543 F.3d 59 (2d Cir. 2008). For the reasons set forth in this declaration, I have concluded that the official release of these images, even if redacted to obscure identifying information, could reasonably be expected to:

a. (U) Endanger the lives of U.S. and coalition Soldiers, Airmen, Marines, Sailors, civilians, and contractors presently serving in Iraq;

b. (U) Endanger the lives of Iraqi civilians, police, military personnel and government officials;

c. (U) Aid in the recruitment and financing of extremists and insurgent groups; and

d. (U) Undermine the improving security conditions in Iraq.

3. (U) My conclusions are based on my years of service and experience in the United States military in general and Iraq in particular, intelligence and operations reports and assessments of the situation in Iraq, the assessments and evaluations of my subordinate commanders, the declarations made previously in this case, and regular interaction with Iraqi leaders. In particular:

a. (U) I have served in the United States Army for over 32 years at various levels of command and staff. I have commanded units at every echelon, from platoon

to theater. My staff experience includes serving as the Assistant to the Chairman of the Joint Chiefs of Staff, where I was the primary military advisor to Secretaries of State Colin Powell and Condoleezza Rice. I have extensive experience in Iraq, including command at the division, corps, and theater levels. I commanded the 4th Infantry Division, which was headquartered in the Sunni Triangle, when it was deployed to Iraq from April 2003 to March 2004. I commanded the Multi-National Corps-Iraq, which is the operational command responsible for coalition forces throughout Iraq, from December 2006 to February 2008, during the surge of U.S. forces. I assumed my current command at Multi-National Force-Iraq, which is the strategic command responsible for coalition operations in Iraq, in September 2008. As a result of this experience, I have intimate and extensive knowledge of our forces and their capabilities, as well as those of the enemies who threaten U.S., Coalition, and Iraqi forces and interests.

b. (U) I receive daily intelligence and operations briefings regarding the political, economic, diplomatic, and security environment in Iraq. These briefings are produced by subject-matter experts, and I rely on and trust their expertise and insights.

c. (U) I frequently travel throughout Iraq to see firsthand the situation across the country. During these missions, I receive reports from subordinate operational and tactical commanders who provide insights from the local and regional levels.

d. (U) I reviewed and relied upon the Declaration of Brigadier General Carter F. Ham, dated April 26,

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2006, and the Second Amended Declaration of the former Chairman of the Joint Chiefs of Staff, General Richard B. Myers, dated August 25, 2005, which were submitted to the district court regarding photos purporting to show detainee abuse.

e. (U) I am constantly engaged with the senior political leaders in Iraq, who share with me their unique insights into the conditions within their country. As the conflict on Iraq will impact their nation for decades to come, I find their perspective to be persuasive.

4. (U) I strongly believe the release of these photos will endanger the lives of U.S. Soldiers, Airmen, Marines, Sailors and civilians as well as the lives of our Iraqi partners. Certain operating units are at particular risk of harm from the release of the photos. One example is our training teams throughout Iraq. These are small elements of between 15 and 30 individuals who live on Iraqi-controlled installations and thus do not have the same protections afforded to many of our service members. In addition, as they assist our Iraqi partners, members of such teams are regularly engaged in small-unit patrols, making them more vulnerable to insurgent attacks or other violence directed at U.S. forces. Accordingly, there is good reason to conclude that the soldiers in those teams and in similarly situated units would face a particularly serious risk to their lives and physical safety.

5. (U) The publication of these photos will be likely to significantly and adversely impact the MNF-I mission to develop a strategic partnership with a stable, secure, prosperous, and democratic Iraq that reflects its

society and culture, stands as an ally in the war on terror, and contributes to peace and stability in the region. The photos will likely cause a very public and emotional response in Iraq and in the larger Arab world because the images may touch on a number of deep-rooted Arab cultural values that will resonate with the Iraqi public. The Iraqi public, if inflamed with emotion, may be easily manipulated by competitors seeking to exploit this opportunity to their full advantage. Many Arabs harbor long-standing perceived grievances against the west in general and the U.S. in particular. The release of these photographs likely will only fuel this resentment.

6. (U) In April 2004, news organizations published reports of U.S. abuses of Iraqi detainees that publicly disseminated an initial set of photographs taken at the Abu Ghraib prison. Extremist organizations including al Qaeda in Iraq (AQI) and Islamic State of Iraq (ISI) used the revelations of detainee abuse and copies of associated photographs to recruit and motivate organization members. The graphic revelations of detainee abuse motivated some terrorists including foreign fighters from Syria, Yemen and Saudi Arabia to join the jihad. Reporting also indicates that some organizations may have staged and disseminated photographs of Arab women being abused by men in U.S. uniforms. Extremist groups initially misrepresented the depicted abuse as evidence of the widespread rape of female Iraqi detainees by U.S. soldiers as a further motivation for recruitment and to support the exhortation for attacks against Coalition Forces (CF).

7. (U) The public dissemination of detainee abuse photos in 2004 likely contributed to a spike in violence in

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Iraq during the third quarter of 2004 as foreign fighters and domestic insurgents were drawn to Iraq to train and fight. Attacks on CF increased from around 700 in March 2004 to around 1800 in May (after the photographs were broadcast and published) and 2800 in August 2004. Attacks on CF did not subside to March 2004 levels until June 2008. These increased attacks resulted in the death of CF, Iraqi forces, and civilians.

8. (U) The 2004 publication of detainee photos resulted in a number of postings on internet websites. In May 2004, one posting called for the dissemination of photographs depicting Iraqi women being raped in U.S. prisons, "because now the timing is better than ever." Another posting referenced "torture and rape" of Muslims in Iraqi prisons, while calling for Saudi security forces to refrain from assisting CF. In June 2004, several Islamist, Jihadist, and Salafist websites provided links to an audio message, purportedly made by al-Qaeda leader Abu Musab al-Zarqawi. The message included a threat to kill the Prime Minister of Iraq, Ayad Allawi, and referred to alleged degrading treatment suffered by female detainees.

9. (U) Perhaps the most gruesome of internet reactions to the photo publication was a video posted in May of 2004 showing the decapitation murder of U.S. contractor Nicholas Berg. A man believed to be Zarqawi specifically made the linkage between the abuses at Abu Ghraib and Berg's murder, saying, "And how does a free Muslim sleep comfortably watching Islam being slaughtered, and [its] dignity being drained. The shameful photos are evil humiliation for Muslim men and women in the Abu Ghraib prison. . . . We tell you

that the dignity of the Muslims at the Abu Ghraib prison is worth the sacrifice of blood and souls. We will send you coffin after coffin and box after box slaughtered in this way." The June 2004 kidnapping and murder of U.S. contractor Paul Johnson, Jr. and other anti-Western incidents in Saudi Arabia were possibly influenced by the coverage of Berg's kidnapping and murder.

10. (U) While conditions in Iraq have improved since the declaration of BG Ham and Gen Myers, I concur with their overall assessment of the potential impact of releasing images purporting to show detainee abuse. Extremist groups will likely use any means necessary to incite violence and, specifically, have and will likely focus on perceived U.S. or Coalition mistreatment of Iraqi civilians and detainees as a propaganda and recruiting tool to aid their cause. *See* BG Ham's Decl. ¶ 7 and Gen Myers' Decl. ¶ 8. The next six to eight months are a time of particular fragility in Iraq. Withdrawal of U.S. combat forces from Iraqi cities, villages, and localities, elections for the Kurdistan Regional Government, a national referendum on the Security Agreement, a national census, and national elections are tipping points in the near future that extremist groups reinvigorated by release of the photos may seek to manipulate through violence.

11. (U) MNF-I will likely experience an increase in security incidents particularly aimed at U.S. personnel and facilities following the release of the photos. Incidents of spontaneous violence against U.S. Forces, possibly including attacks from outraged Iraqi police or army members are likely. This could weaken our partnership with the Iraqi Security Forces, decrease secu-

rity, and lead to more violence. Attacks against soft targets which represent visible symbols of U.S. presence or culture are also likely. Such increased attacks will put U.S. Forces, civilians, and Iraqi partners at risk of being killed, injured, or kidnapped. The photos will likely be used as a justification for adversaries conducting retribution attacks against the U.S. for bringing shame on Iraq.

12. (U) Sunni ethno-sectarian nationalist and Islamist resistance groups, Salafist-jihadist extremist groups and Shia armed militia groups all oppose the U.S. presence and will likely attempt to exploit the release in their propaganda campaigns. Anti-U.S. groups will likely attempt to misrepresent the photos as evidence of continuing U.S. misconduct and noncompliance with international law and the standards of a humane and civilized society. The U.S. will also likely be portrayed as the continuing oppressor of Iraqis, Arabs and Muslims. In addition, opponents of a U.S. presence, such as the Sadrists and Iran, may use the photographs as propaganda supporting calls for a referendum on the U.S.-Iraq bilateral security agreement. The release of the photographs is likely to harden existing anti-US opinion in the Council of Representatives (COR), and in local and regional media.

13. (U) These propaganda measures will likely increase popular and financial support for anti-U.S. groups and may have a positive influence on recruitment for some groups. In particular, Sadrist political figures and their associated groups may respond to the release of photos by calling for mass demonstrations against the continuing presence of U.S. forces in Iraq.

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14. (U) The Security Agreement Referendum is scheduled for this summer. The release of the photos may incite the Iraqi public and cause the referendum to be defeated. If the referendum is defeated, U.S. Forces will be required to leave Iraq earlier than scheduled, further destabilizing the region and leaving Iraq vulnerable to outside influences, especially from Iran.

15. (U) MNF-I detainee release and reconciliation initiatives may be impacted as adversaries exploit these images to increase recruiting and motivate members to conduct attacks against the U.S. Iraqi community and political leaders will likely seek to avoid any potential liability associated with ties to U.S. detainee operations. Detainees released from our facilities may provide a focused target for extremist recruiting by characterizing all former detainees as having an obligation to restore the honor taken from the specific victims in the photos. This characterization may gain momentum among those detainees who were already vulnerable due to unemployment or community hostility by making them believe that the taint of their detention in a U.S. facility leaves them with no options.

16. (U) I believe these images will be used to inflame outrage against the U.S. and be used by terrorist organizations to recruit new members. The release of the photos will likely incite Muslim idealists to join the cause to seek retribution for the dishonor they may perceive to have been brought against all Muslims by the U.S. inside Iraq, the publicity over the images could incite additional attacks on U.S. personnel by members of the Iraq Security Forces ("green-on-blue" attacks); whether individually motivated, or instigated by an ex-

tremist affiliation. Groups most likely to use this as an opportunity to recruit and engage in attacks against US Forces are Sunni foreign fighters and Sunni extremists. Groups more likely to use this as an opportunity to draw attention to Iraqi jurisdiction and the relationship between Iraq and the United States are Shia extremists.

17. (U) MNF-I will likely experience an increase in attacks against U.S. Forces and bases as the photos incite retaliation by the Iraqi public. Iraqi Security Forces and the Government of Iraq (GoI) may experience a similar increase in attacks as a protest against the U.S./GoI partnerships. Less violent, but still posing a challenge for the U.S., may be an increase in the number of unspecified allegations of recent mistreatment in order to contradict our statements that the photos do not represent our policies, practices, or values. These claims could be exacerbated by calls for criminal prosecutions in Iraqi courts over U.S. servicemembers alleged to have engaged in mistreatment.

18. (U) The Iraqis, from their point of view, may feel largely excluded from the public discourse these images may generate in the U.S. and world stage. As was the case following Abu Ghraib, Iraqis may feel that the dignity of any Arab is of little consequence to the Americans when compared to their own interests. The official positions and talking points of the various stakeholders may do little to refute their certainty. The Iraqis likely will express this sentiment in a very public way utilizing media, political, and cultural mechanisms.

19. (U) During my conversations with senior Iraqi officials, they have expressed extreme concern about

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the impact of the potential release of photos depicting actual or perceived abuse of detainees ("abuse photos"). Among their concerns were that release of such photos would increase the pressure to release individuals that U.S. forces are currently holding as security detainees. These individuals currently are being released in a safe and orderly fashion, and accelerating the process could disrupt the delicate security balance in Iraq. They also stated that those in violent opposition to the political process would likely use abuse photos to maximize support, increase funding, and stiffen the resistance. They believe that releasing such photos will result in an outbreak of violence directed at U.S. forces and facilities. Furthermore, they are concerned that releasing abuse photos will severely impact reconciliation as former opposition elements meet resistance to reconciling with a Government that has aligned itself with the country that committed this abuse.

20. ~~(S)~~ [REDACTED]

21. ~~(S)~~ [REDACTED]

22. ~~(S)~~ [REDACTED]

23. (U) A senior member of a prominent Sunni political group and a member of the Council of Representatives (the COR is the parliament) told a senior MNF-I leader that insurgents and terrorist groups will exploit the release of abuse photos to steadily increase attacks against U.S. Forces and Iraqis working with U.S. Forces. This COR member was consulted for a Sunni perspective, and he wished to emphasize that release of abuse photos would cause disturbances in Iraq: "With all due respect to freedom of information in the United

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States," for Iraq's sake he urged that they not be released at this time. "A release would disturb plans for [democratic] progress in the country because the Iraqi people would react poorly. In light of upcoming national elections, Iraqi politicians would exploit the situation to attract votes, further stirring things up."

24 ~~(S)~~ [REDACTED]

25. (U) A senior Shi'a member of the COR in a recent discussion with a senior MNF-I leader also raised concerns that the release of abuse photos would disrupt Iraq's democratic process, its security environment, and U.S.-Iraq relations. He stated that this is the worst possible time to release abuse photos as it is just prior to the beginning of the second Iraqi national election season. The release, he explained, would only serve to embarrass the Maliki government. The release would also expose the Maliki government to criticism from political opponents like militant Sunni nationalists or the Sadrists who would want to use any tool available to embarrass the current government. Furthermore, the "oppositionists" could tie the abuse scandal to their support for the U.S./Iraq Security Agreement (SA). He added that the lack of support could impact the ability of the GoI to defend the implementation of provisions in the SA, including any requests for U.S. military support in security operations in cities, villages, and localities, and implementing legal provisions concerning U.S. troops accused of crimes while conducting operations. Moreover, he explained that release of abuse photos would only serve to increase calls for a referendum on the Security Agreement and would prejudice the Iraqi public against any agreement that would serve Iraq and U.S.

long term security interests. Release of abuse photos would serve insurgent or terrorist interests by providing them with a propaganda windfall that would help recruit and find support from the population since it would be inevitable that many in the Iraqi public would feel a desire to take revenge on those whom they see as occupiers who humiliated them. Finally, he stated release of abuse photos would, in his opinion, directly endanger U.S. troops and civilians attempting to support the GoI efforts to improve security and services to the population as well as put Iraqi civilians at risk.

26. (U) Reconciliation among the various groups in Iraq is one of the prime efforts with which we support and assist the GoI. Recently, a senior official within the Government of Iraq who addresses reconciliation issues stated that timing now is poor for Iraq. He observed that those who support the reconciliation process might treat the photo release with equanimity, while those who oppose the political process would seek to use it as an instrument to create difficulties in advancing the strategic relationship. Further, those who oppose the process through violent means would likely seek to use abuse photos to maximize their support, seek additional funding from regional paymasters, and use the anger generated as a "recruiting sergeant" to stiffen the resistance. He agreed this is a problematic issue that needs resolution, but now would not be a good time, and it would not assist the reconciliation process.

27. (U) Political competitors are likely to exploit abuse photos as a means to gain leverage or improve negotiating positions—this political maneuvering may be focused on MNF-I and our allies in the Government of

Iraq. Indeed, this could be a destabilizing event for the Prime Minister and his government. Moreover, any key leaders associated with our detention programs, such as judges or tribal leaders who participate in reconciliation efforts for released detainees, may distance themselves from the U.S. If publicly challenged, they could support a contrarian position against the U.S. Even if conditions do not rise to the level of green-on-blue attacks, units could experience increased tension from their Iraqi partner units, resulting in a reduction in the level of combined operations and training. This lack of partner unit cooperation would severely impact our ability to continue to operate under the Security Agreement, which requires agreement and coordination with the GoI.

28. (U) Iraq today is safer, but it is not without risk. The near future has several critical events that extremist groups may attempt to influence through violence. There are still attacks against coalition and Iraqi forces, and release of the photos would likely boost the recruiting and fund raising that enables those attacks. While not every attacker is as honest about his motivation as the murderers of Nicholas Berg, it is my belief, based on my years of experience and judgment, that release of the photos would reasonably be expected to destabilize the country and endanger American, Coalition, and Iraqi lives.

(U) I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

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Executed on 27 May 2009.

/s/ RAYMOND T. ODIERNO
RAYMOND T. ODIERNO
General, U.S. Army
Commanding General, MNF-I

APPENDIX L

1. The Freedom of Information Act, 5 U.S.C. 552, provides in pertinent part:

Public information; agency rules, opinions, orders, records, and proceedings

* * * * *

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwar-

ranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

* * * * *

2. The Freedom of Information Act, 5 U.S.C. 552 (1982), provided in pertinent part:

Public information; agency rules, opinions, orders, records, and proceedings

* * * * *

(b) This section does not apply to matters that are—

* * * * *

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

* * * * *

No. 09-160

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF DEFENSE, ET AL.,

Petitioners,

—v.—

AMERICAN CIVIL LIBERTIES UNION, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether the government may rely on Exemption 7(F) of the Freedom of Information Act, an exemption intended to protect individuals who would be endangered by the disclosure of identifying information contained in law enforcement records, to withhold photographs depicting the abuse of prisoners by U.S. personnel in Afghanistan and Iraq based on a general assertion that release of the photographs could provoke a violent response.

CORPORATE DISCLOSURE STATEMENT

Respondents have no parent corporations, and no publicly held company owns 10% or more of respondents' stock.

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STATEMENT OF THE CASE

This case concerns the public's right to know about the treatment of prisoners held by the U.S. government overseas. It arises from Freedom of Information Act ("FOIA") requests filed by respondents after news organizations reported that prisoners held by the Defense Department and Central Intelligence Agency had been abused, tortured, and in some cases killed in custody. Respondents' FOIA requests, filed in October 2003 and May 2004, sought records concerning the "treatment of Detainees" held by the United States overseas, the "deaths of [such] Detainees" in custody, and the "rendition of Detainees and other individuals" to countries known to employ torture. Respondents commenced the instant litigation in June 2004. At the time, nine months had passed since respondents' first request, but the only record that the government had released was a five-page set of talking points authored by the State Department.

In August 2004, the district court ordered the government to process respondents' requests and directed respondents to supply the government with a priority list in order to aid the government in doing so. *Am. Civil Liberties Union v. Dep't of Def.*, 339 F. Supp. 2d 501, 502-05 (S.D.N.Y. 2004). On their priority list, respondents identified, among other records, a set of photographs and videos that Army Specialist Joseph Darby had provided to Army investigators (the "Darby photographs"). A subset of those photographs had been published by the media in April 2004; they depicted prisoners at the Abu

Ghraib prison in Iraq who had been stripped naked, sexually humiliated, held in "stress positions," and threatened with dogs.

The government refused to release the Darby photographs, citing FOIA Exemptions 6 and 7(C), which authorize withholding where disclosure would constitute an "unwarranted invasion of personal privacy." *See* Pet. App. 112a-113a. It argued that the disclosure of the photographs would infringe the privacy interests of the prisoners depicted even if the photographs were redacted to obscure identifying features. *Id.*[1] More than two months after oral argument, however, the government offered a new justification for withholding the photographs: that the photographs were exempt under 5 U.S.C. § 552(b)(7)(F) because they were "compiled for law enforcement purposes" and disclosure "could reasonably be expected to endanger the life or physical safety of any individual." Pet. App. 124a. The government contended, in particular, that release of the photographs could reasonably be expected to endanger the life or safety of U.S. troops, other Coalition forces, and civilians in Iraq and Afghanistan. *Id.* at 125a. The government stated that these concerns related to "national security," but

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[1] The government also argued that disclosure would violate the prisoners' Geneva Convention rights, Pet. App. 122a-123a, though the government had contended in other contexts that at least some of the prisoners were not entitled to the protection of those Conventions, *see, e.g.*, Memorandum from President George Bush, *Humane Treatment of Taliban and al Qaeda Detainees* (Feb. 7, 2002). Both the district court and Second Circuit rejected the argument, Pet. App. 52a-59a, 122a-124a, and the government does not pursue it here.

it did not invoke FOIA's national security exemption. *Id.* at 20a.

In a September 2005 order, the district court rejected the government's privacy arguments, finding that the prisoners' privacy interests could be protected by the redaction of identifying features and that any residual privacy interest would be outweighed by the public interest in disclosure. *Id.* at 116a-122a. The district court also rejected the government's "supplemental" argument relating to Exemption 7(F). *Id.* at 124a-133a. The court acknowledged the "risk that the enemy will seize upon the publicity of the photographs and seek to use such publicity as a pretext for enlistments and violent acts." *Id.* at 132a. It rejected the contention, however, that the language of Exemption 7(F)—and in particular the phrase "any individual"—could be stretched to authorize the withholding of evidence of governmental misconduct based solely on general assertions of harm that might attend its potential use as propaganda. *Id.* at 130a-131a. The court also noted that the public interest in the photographs was significant, that disclosure would foster "education and debate," and that the "core values of FOIA [were] very much implicated." *Id.* at 131a-132a.

The government appealed the district court's order but withdrew its appeal after a third party published the Darby photographs on the Internet. The government subsequently acknowledged, however, that it possessed 29 other photographs responsive to respondents' FOIA requests. Whereas the Darby photographs involved abuse at the Abu Ghraib prison, according to the government the 29

additional photographs were taken in at least seven different locations in Afghanistan and Iraq. Relying on the reasoning of its September 2005 order, the district court ordered the government to disclose 21 of the photographs, all but one in redacted form. *Id.* at 61a-62a. The court found that 8 of the photographs were not responsive to respondents' FOIA requests. *Id.* at 64a.[2]

A unanimous panel of the Second Circuit affirmed. The court found that the plain language of Exemption 7(F) requires the government to do more than "point to a group composed of millions of people and establish that it could reasonably be expected that someone in that group will be endangered." *Id.* at 11a. While the provision does not require the government to *name* a specific individual, or even to identify a single individual rather than a small group of individuals, the provision's reference to "any individual," the court held, requires "that the subject of the danger be identified with at least reasonable specificity." *Id.* Conversely, to construe the provision in the sweeping manner proposed by the government, the court concluded, would read the phrase "any individual" out of the statute altogether. *Id.* at 16a. Whether the government had satisfied the proper standard here, the court then found, was "not a close question." *Id.* at 18a.

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[2] The government informed respondents on June 29, 2006, that it possessed an additional 23 images responsive to respondents' requests, Pet. App. 6a n.2, and on May 28, 2009, it acknowledged the existence of an unspecified but "substantial number" of additional responsive images, *id.* at 185a. All of the images at issue here relate to closed investigations. Pet. 6.

The court supported its conclusion as to the scope of Exemption 7(F) by noting that FOIA includes a separate exemption for withholdings justified by national security concerns and that this exemption, together with the Executive Order referenced in the exemption, "set[] forth limits on what may be classified, by what authority, and for how long." *Id.* at 20a.[3] To adopt the government's unprecedented construction of Exemption 7(F), the court reasoned, would "convert exemption 7(F) into, in effect, an alternative classification mechanism entirely lacking the executive's safeguards and standards." *Id.* at 22a-23a.

The court also found that its construction of Exemption 7(F) was consistent with that provision's legislative history and with the weight of the case law interpreting the exemption. *Id.* at 24a-43a. Finally, the court observed that the government's alternative construction would have implications far beyond the circumstances presented by this case. As the court explained, the government's argument could be advanced "with respect to many other documents in a wide range of cases, particularly controversial documents that the government might have the greatest motivation to withhold." *Id.* at 42a. The government's construction, the court concluded, "would radically transform exemption

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[3] Specifically, Exemption 1 provides for the withholding of "matters that are . . . (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1).

7(F) from a flexible but tailored protection for a fluid but limited class of persons into an alternative secrecy mechanism far broader than the government's classification system." *Id.* at 43a.[4]

The Second Circuit denied the government's petition for rehearing en banc on March 11, 2009. *Id.* at 134a-135a. On April 23, the government informed the district court in writing that it would "not seek certiorari of the Second Circuit's decision," Letter from Lev L. Dassin, Acting U.S. Attorney, to Hon. Alvin K. Hellerstein (Apr. 23, 2009), *available at* http://www.aclu.org/pdfs/safefree/letter_singh_20090423.pdf, and the court of appeals issued its mandate on April 27.[5] On May 13, however, the government announced that it had changed its position and would petition this Court for review of the Second Circuit's decision. The government moved the appeals court to recall its mandate on May 13, and that motion was granted on June 10. The government filed its petition for a writ of certiorari on August 7, 2009.

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[4] The court also rejected the government's reliance on Exemptions 6 and 7(C), Pet. App. 43a-59a, and the government does not ask this Court to review those rulings, Pet. 9 n.7.

[5] At a press conference on April 24, 2009, the White House Press Secretary explained that "the Department of Justice [had] decided based on the [Second Circuit's] ruling that it was hopeless to appeal." The White House, Office of the Press Secretary, Press Briefing, Robert Gibbs (Apr. 24, 2009), *available at* http://www.whitehouse.gov/the_press_office/Briefing-by-White-House-Press-Secretary-Robert-Gibbs-4-24-09.

REASONS FOR DENYING THE PETITION

The appeals court correctly determined that the FOIA exemption invoked by the government in this case—Exemption 7(F)—does not authorize the government to withhold prisoner abuse photographs based on a general assertion that release of the photographs could provoke a violent response. There was no dissent from the court of appeals' well-reasoned decision, and the government does not claim any conflict in the circuits on the scope of Exemption 7(F). Moreover, the appeals court's decision has no effect on the government's ability to argue that particular records—including photographs—can be withheld on the basis of FOIA's national security exemption, because the government has not invoked that exemption in this case and the courts below did not consider its scope. To grant the government's petition would only serve to further delay the disclosure of information that is of extraordinary interest to the public and of crucial importance to the ongoing national discussion about the abuse of prisoners in U.S. custody overseas.

The government's contention that the court of appeals misconstrued Exemption 7(F) is without merit. As the court noted, the provision's plain language, its statutory context, its legislative history, and the weight of the relevant case law all support the same conclusion: While Exemption 7(F) does not require the government to *name* a specific individual who could reasonably be expected to be endangered by disclosure, the exemption requires the government to identify the subjects of the danger with reasonable specificity. Indeed, virtually all of

the cases that have upheld the government's reliance on Exemption 7(F) have involved law enforcement records that themselves identified, at least inferentially, the individuals whom the government asserted would be harmed by disclosure. Although Congress expanded Exemption 7(F) in 1986 to protect non-law-enforcement personnel potentially endangered by the release of law enforcement records, Congress did not, in doing so, make the exemption limitless, and no court has endorsed the sweeping construction that the government proposes. As the court of appeals properly recognized, Congress did not intend the exemption to become an "ersatz classification system," Pet. App. 42a; nor did it intend the exemption to be used as an "all-purpose damper on global controversy," *id.* at 36a.

This Court has noted that FOIA was enacted "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *see also Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004) (describing FOIA as "a structural necessity in a real democracy"). The government's argument here, however, would turn FOIA on its head by affording the greatest protection from disclosure to records that depict the worst governmental misconduct. The court of appeals was right to reject this argument, and this Court should deny the government's petition.

I. THE SECOND CIRCUIT PROPERLY REJECTED THE GOVERNMENT'S RELIANCE ON EXEMPTION 7(F) TO WITHHOLD PRISONER ABUSE IMAGES BASED ON A GENERAL ASSERTION THAT RELEASE COULD PROVOKE A VIOLENT RESPONSE.

A. The Plain Language and Statutory Context of Exemption 7(F) Compel the Second Circuit's Conclusion

Exemption 7(F) permits the withholding of "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F). The court of appeals correctly found that this language requires the government to do more than establish that "out of a population the size of two nations and two international expeditionary forces combined, someone somewhere will be endangered as a result of the release of the Army photos." Pet. App. 18a. As the court explained, had Congress used the phrase "endanger life or physical safety" (without more), it would have signaled a concern with "danger in general"; Congress's inclusion of the words "of any individual," however, "indicates a requirement that the subject of the danger be identified with at least reasonable specificity." *Id.* at 11a; *see also id.* at 17a.[6] Thus, the

[6] The statute's specificity requirement is not satisfied by the government's still-general claim—raised for the first time in its motion to the Second Circuit seeking a recall of the mandate—

government's contention that the court of appeals grafted an "extra-textual" requirement onto the language of the statute is simply wrong. The court's construction was rooted in the statute's plain language, while the government's proposed construction would render the phrase "any individual" entirely superfluous. The decision below properly construed Exemption 7(F) to "avoid surplusage." *Id.* at 16a.[7]

Also counseling against the government's sweeping construction of Exemption 7(F) is the statutory context in which the exemption appears. The title of the "Freedom of Information Act" reflects an overarching purpose, which was to expand public access to information in the hands of the government. *Id.* at 15a ("'The title of an act cannot control its words, but may furnish some aid in showing what was in the mind of the legislature.'" (quoting *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818) (Marshall, C.J.))). The Act instructs that agency records are to be made available "'except as *specifically* stated' in one of the enumerated

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that the danger to certain American personnel stationed abroad is heightened because their assignments generally place them in greater danger. *See* Pet. 31 n.11. Moreover, the government does not assert that any such danger would stem from the disclosure of identifying information.

[7] Recognizing that the text of Exemption 7(F) did not read "'any *named* individual,'" the court understood the term "individual" "to include individuals identified in some way other than by name—such as, for example, being identified as family members or coworkers of a named individual, or some similarly small and specific group." Pet. App. 11a (emphasis in original).

exemptions." Pet. App. 15a (emphasis in original) (quoting 5 U.S.C. § 552(d)). Those exemptions, this Court has instructed, are to be "'narrowly construed.'" Pet. App. 15a (quoting *Fed. Bureau of Investigation v. Abramson*, 456 U.S. 615, 630 (1982)); *accord U.S. Dep't of Justice v. Julian*, 486 U.S. 1, 8 (1988); *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). As the court of appeals rightly observed:

> The defendants' construction of "any individual" as not requiring the government to name or even roughly identify any individual, besides gesturing to the populations of two nations and two international expeditionary forces and showing that it could reasonably be expected that at least one person within them will be endangered, is not a narrow one. The reading of "any individual" as requiring a FOIA defendant to identify an individual with reasonable specificity is a narrower construction, and to be preferred on that ground alone.

Pet. App. 15a.

The court of appeals also properly recognized that the government's nearly limitless construction of Exemption 7(F) is further undercut by the existence of FOIA's national security exemption. *Id.* at 20a. As noted above, Exemption 1 exempts from disclosure records that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact

properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). Executive Order 13,292, in turn, "prescribes a uniform system for classifying . . . national security information." Exec. Order No. 13,292, 68 Fed. Reg. 15,315 (Mar. 25, 2003). It also "sets forth limits on what may be classified, by what authority, and for how long." Pet. App. 20a. Among these limits is the prohibition against classifying information in order to "conceal violations of law, inefficiency, or administrative error," or to "prevent embarrassment to a person, organization, or agency." *Id.* at 20a-21a (quoting Exec. Order No. 13,292, § 1.7(a)) (internal quotation marks omitted). As the court of appeals observed, the government's construction of Exemption 7(F) would allow an agency to "evade the strictures and safeguards of classification" simply by asserting that records compiled for law enforcement purposes could, if disclosed, "reasonably be expected to endanger someone unidentified somewhere in the world." Pet. App. 22a. This would in effect create "an alternative classification mechanism entirely lacking the executive's safeguards and standards," *id.* at 22a-23a, an outcome that would be "inconsistent with the structure of FOIA's exemptions," *id.* at 23a.

Moreover, "[t]he limitation of exemption 7(F) to law enforcement records does not diminish that inconsistency," *id.*, for two reasons:

> First, the ease with which the government can find refuge for its records on the ground that they were compiled for "law enforcement purposes" can hardly be overstated. *See*

> [*John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 162-64 (1989)] (Scalia, J., dissenting) (describing the ability to transfer records to an investigation file as "a hole one can drive a truck through"). Second, assuming the utmost good faith of the government, the disparate treatment that would be accorded law enforcement national security information and non-law-enforcement national security information confirms that exemption 7(F) will not bear the weight the defendants place upon it. Information generated from national security operations unconnected to law enforcement would be inexplicably subject to higher judicial scrutiny, through exemption 1, than information generated from national security operations performed by means of law enforcement.

Id.

The government takes issue with the Second Circuit's discussion of FOIA's national security exemption, contending that because Exemptions 1 and 7(F) involve "different inquir[ies]," Exemption 1 cannot provide a basis for reading Exemption 7(F) restrictively. Pet. 25. The government misses the point. Its construction of Exemption 7(F) is untenable precisely because it would establish a different, much lower standard for withholding information on national security grounds, and would

thereby allow the government to circumvent the safeguards and limitations set out in Exemption 1 and the Executive Order referenced therein. Pet. App. 22a-23a. The problem with the government's construction is not simply that Exemptions 1 and 7(F) "may both be available" with respect to the same records, Pet. 25, but that the government's construction would render Exemption 1 superfluous, Pet. App. 22a-23a.

The government insists that the "textual breadth," of the term "any individual" is necessarily "all-encompassing." Pet. 17, 23. But like every other word, the word "any" takes its meaning from its context. As this Court has recognized in another FOIA case:

> [t]he notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification. . . . For our duty . . . is to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested.

Abramson, 456 U.S. at 625 n.7 (quoting *United States v. Monia*, 317 U.S. 424, 431 (1943) (Frankfurter, J., dissenting), and *NLRB v. Lion Oil Co.*, 352 U.S. 282, 298 (1957) (Frankfurter, J., concurring in part and dissenting in part)) (internal quotation marks omitted); *see also Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) ("The definition of words in isolation . . . is not necessarily

controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis."). This Court's jurisprudence construing the word "any" confirms that "'any' can and does mean different things depending upon the setting." *Nixon v. Mo. Mun. League*, 541 U.S. 125, 132 (2004).[8]

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[8] Cases cited by the government in support of an expansive interpretation of the word "any," *see* Pet. 17, only confirm the relevance of statutory context in construing that word. *See Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 128 S. Ct. 831, 837-38 (2008) (considering context in construing the phrase "any other law enforcement officer"); *United States v. Gonzales*, 520 U.S. 1, 9-11 (1997) (considering context and a later statutory amendment in construing the phrase "any other term of imprisonment"). Notably, although the government relies on *Ali*'s broad construction of the phrase "any other law enforcement officer," this Court interpreted a virtually identical phrase in *United States v. Alvarez-Sanchez* much more narrowly in light of the statutory context there. 511 U.S. 350, 357 (1994) (holding that it was error to "plac[e] dispositive weight on the broad statutory reference to 'any' law enforcement officer or agency without considering the rest of the statute," and construing "any" law enforcement officer to be limited to federal officers); *see also Ali*, 552 U.S. at 836 n.4 (citing *Alvarez-Sanchez*).

This Court has interpreted the word "any" in a limited manner where the context has so demanded. *See, e.g., Small v. United States*, 544 U.S. 385, 394 (2005) (concluding that "the phrase 'convicted in any court' refers only to domestic courts, not to foreign courts"); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 586-91 (2004) (rejecting the appellate court's

The government assured the court below that its proposed construction would be "[l]imited to the [f]acts [p]resented by [t]his [c]ase." Pet. App. 42a. There is no doubt, however, that the government's proposed construction of Exemption 7(F) would permit the suppression of a wide array of information, including information relating to governmental misconduct. *Id.* ("While it is true . . . that expert affidavits deem these particular [photographs] to pose such a danger, we have no

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construction of the Age Discrimination in Employment Act—that its prohibition of age discrimination against "any individual" protects younger, as well as older, individuals, *Cline v. Gen. Dynamics Land Sys., Inc.*, 296 F.3d 466, 469 (6th Cir. 2002)—in favor of a limited construction more consonant with the "whole provision" and its legislative history); *Nixon*, 541 U.S. at 132 (rejecting argument that a statute's reference to "any entity" encompasses both private and public entities); *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 542 (2002) (construing the phrase "any claim asserted" not to include state-law claims against non-consenting states that are dismissed on Eleventh Amendment grounds); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113-19 (2001) (narrowly construing the phrase "any other class of workers engaged in foreign or interstate commerce" in light of its context); *Gutierrez v. Ada*, 528 U.S. 250, 254-58 (2000) (construing the phrase "votes cast in any election" in light of congressional intent to apply only to votes cast for gubernatorial slates); *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 15-16 (1981) ("It is doubtful that the phrase 'any statute' includes the very statute in which this statement was contained."); *Flora v. United States*, 362 U.S. 145, 149 (1960) ("A catchall the phrase ['any sum'] surely is; but to say this is not to define what it catches."); *Palmer*, 16 U.S. (3 Wheat.) at 631 (Marshall, C.J.) (adopting a limited interpretation of "any person or persons" because "general words" must be limited "to those objects to which the legislature intended to apply them").

doubt that similar affidavits could be produced with respect to many other documents in a wide range of cases, particularly controversial documents that the government might have the greatest motivation to withhold."). Indeed, the government's construction of Exemption 7(F) would grant the greatest protection against disclosure to records that depict the most egregious abuses, because it is these records that are most likely to be inflammatory, and it is these records that insurgents and terrorist groups are most likely to "seize upon . . . as grist for their propaganda mill." *Id.* at 181a. Accepting the government's argument would turn FOIA on its head.

The government's further argument that the court of appeals' construction of Exemption 7(F) assumes that Congress placed a "low value on human life," Pet. 17, misunderstands both the structure of FOIA and the principles underlying the Act. Through its nine exemptions, FOIA balances the public interest in disclosure on the one hand with significant governmental concerns on the other. As the court made clear, Exemption 7(F) remains available where the government can identify, with "reasonable specificity," those who would be harmed by disclosure. The court continued: "To say that Exemption 7(F) does not contemplate withholding records on the basis of diffuse threats of death or physical injury, threats which are individually speculative but which can reasonably be expected with respect to large populations, is not to denigrate such threats, which of course are characteristic of the national security sphere." Pet. App. 19a-20a. In those circumstances, "FOIA . . . provides a separate

exemption specifically tailored to the national security context." *Id.* at 20a. The government has not invoked the national security exemption in this case, however, *id.* at 22a n.7, and accordingly, the courts below did not consider it.

B. The Legislative History of Exemption 7(F) and Case Law Construing that Provision Support the Second Circuit's Conclusion

The legislative history of Exemption 7(F) underscores that the exemption was intended to apply where the government can identify, with "reasonable specificity," individuals who would be harmed by the disclosure of identifying information contained in law enforcement records. Although the 1986 amendments to Exemption 7(F) were meant to expand the scope of that exemption, Congress did not intend to make the exemption limitless or to render Exemption 1, the national security exemption, superfluous. Rather, as the Second Circuit explained: "Congress has always envisioned exemption 7(F) as a shield against specific threats to particular individuals arising out of law enforcement investigations, never as a means of suppressing worldwide political violence." Pet. App. 24a.

As the court of appeals observed, the legislative history shows that in amending Exemption 7(F) Congress sought to address a specific concern: preventing criminals from exploiting FOIA as a means of intimidation or retaliation against persons associated with law enforcement investigations. Prior to the 1986 amendments,

Exemption 7(F) applied only to certain records that, if disclosed, could endanger "law enforcement personnel." The relatively limited scope of this exemption compromised the "ability of law enforcement officers to enlist informants and carry out confidential investigations," because lawbreakers could use FOIA to obtain information about informants and retaliate against them. *Id.* at 33a (quoting 132 Cong. Rec. S14,038 (daily ed. Sept. 27, 1986) (statement of Sen. Hatch)) (internal quotation marks omitted). In amending Exemption 7(F), Congress extended the protections of FOIA to others who might be harmed by the disclosure of identifying information in law enforcement files. Pet. App. 36a.

Thus, Deputy Attorney General Carol Dinkins testified that the 1986 amendments would "expand[] Exemption 7(F) to include such persons as witnesses, potential witnesses, and family members whose personal safety is of central importance to the law enforcement process." *Id.* at 32a (quoting 131 Cong. Rec. S253 (daily ed. Jan. 3, 1985) (statement of Carol E. Dinkins, Deputy Attorney General)) (internal quotation marks omitted); *see also* 132 Cong. Rec. S14,040 (daily ed. Sept. 27, 1986) (quoting letter from William H. Webster, Dir., FBI, to Sen. Dole) ("This provision would amend the Freedom of Information Act to offer needed protections for confidential undercover informants and investigations."). Many legislators made statements to the same effect. *See, e.g.*, 132 Cong. Rec. H9,465 (daily ed. Oct. 8, 1986) (statement of Rep. Kindness) ("Much of the impetus for adjustment of the [FOIA] provisions . . . comes from the concerns . . . that the

act is exploited by organized crime figures attempting to learn . . . the identities of informants. . . . The amendments to [FOIA] are designed to deal with these particularized law enforcement problems."). *See generally* Pet. App. 31a-36a.

The court of appeals correctly concluded that "defendants' argument for an expansive interpretation of the phrase 'any individual' misapprehends the special problem the 1986 amendment was enacted to correct." Pet. App. 36a. The legislative history cited by the government shows that Congress did not intend to limit the *types* of individuals whose safety could provide a basis for withholding records under Exemption 7(F). *See, e.g.*, Pet. 26 (quoting testimony of then-Professor Scalia: "Why only law enforcement personnel? Why not their spouses and children? Come to think of it, why not *anyone*, even you and me?"); *id.* (quoting Attorney General Civiletti's statement that there is "no reason" for protecting "law enforcement personnel to the exclusion of all others"). That history does *not* establish, however, that Congress intended to permit the government to withhold records without identifying with reasonable specificity the individuals who would be harmed by release. As the court of appeals noted, there is no support in the legislative history for the notion that Congress intended to radically expand Exemption 7(F) to serve as "an all-purpose damper on global controversy." Pet. App. 36a.

In fact, the legislative history makes clear that Congress intended the 1986 amendments to have

only a limited effect on the scope of Exemption 7(F). *See, e.g.*, 131 Cong. Rec. S248 (daily ed. Jan. 3, 1985) (statement of Carol E. Dinkins, Deputy Attorney General) (the 1986 amendments modify Exemption 7(F) only "slightly"); 132 Cong. Rec. H9,462 (daily ed. Oct. 8, 1986) (statement of Rep. English) (the 1986 amendments make "only modest changes to the FOIA" and only "slight[ly] expan[d]" Exemption 7(F)). As the court of appeals noted, there is no evidence that Congress intended the 1986 amendments to "transform[]" Exemption 7(F) into "a diffuse and nebulous authority for keeping inflammatory information secret (though, curiously, only inflammatory information in law enforcement files)." Pet. App. 35a. There is certainly no evidence that Congress intended to create an alternative mechanism for withholding records on national security grounds without compliance with the substantive and procedural safeguards set out in Exemption 1 and the Executive Order referenced therein. The court of appeals properly held that the government's "attempt to sweep far-reaching and speculative national security concerns into exemption 7(F) reaches far beyond the intent of Congress in enacting or amending the provision." *Id.* at 36a.

As the court of appeals noted, the case law overwhelmingly supports this understanding of Exemption 7(F)'s plain language, statutory context, and legislative history. *Id.* at 37a, 42a. No circuit court has adopted a construction remotely as broad as the one the government proposes here. The government relies on an anomalous, unreported

district court case from 1984 that read the exemption broadly, Pet. 21 (citing *Larouche v. Webster*, No. 75 Civ. 6010, 1984 WL 1061 (S.D.N.Y. Oct. 23, 1984)), but virtually all of the pre-1986 cases addressed Exemption 7(F) in contexts in which the government asserted that disclosure of records would endanger specific officers, *see, e.g.*, *Republic of New Afrika v. Fed. Bureau of Investigation*, 656 F. Supp. 7, 12 n.15 (D.D.C. 1986) (Exemption 7(F) applies "where the information relates to 'possible future targets for retaliation.'" (quoting 2 O'Reilly, *Federal Information Disclosure* § 17.12 (1984)); *Moody v. Drug Enforcement Admin.*, 592 F. Supp. 556, 558 (D.D.C. 1984) ("Exemption (b)(7)(F) is designed to protect the identities of law enforcement sources.").[9]

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[9] *See also Schanen v. U.S. Dep't of Justice*, 773 F.2d 1065, 1066 (9th Cir. 1985) (ordering the government to produce for *in camera* inspection, in the context of Exemption 7(F), "the name(s) of the person or persons that appellant alleges would be physically endangered by disclosure, the precise facts that, if disclosed would create such a danger, the precise manner in which such danger would arise if disclosure is ordered, and the name(s) of the person or persons who allegedly pose such a danger"); *Scherer v. Kelley*, 584 F.2d 170, 176 (7th Cir. 1978) (upholding, under Exemption 7(F), the withholding of details of the involvement of law enforcement agents in the criminal investigation of the FOIA requester); *Maroscia v. Levi*, 569 F.2d 1000, 1002 (7th Cir. 1977) (same for "the identities of FBI and other law enforcement personnel"); *Moody*, 592 F. Supp. at 558 (same for the identities of "DEA supervisory agents and other special DEA agents, as well as local law enforcement officers"); *Ferri v. U.S. Dep't of Justice*, 573 F. Supp. 852, 864 (W.D. Pa. 1983) (same for the "names of the government agents contained in the DEA investigative reports"); *Docal v. Bennsinger*, 543 F. Supp. 38, 48 (M.D. Pa. 1981) (same for "the names and identities of DEA Special Agents, Supervisory Special Agents,

Cases post-dating the 1986 amendments appropriately take a broader view of Exemption 7(F) because they address danger to individuals other than law enforcement personnel, but they, too, almost uniformly address contexts in which the government has identified with reasonable specificity the individuals who could be endangered by the release of requested records. Indeed, almost all of these cases involve contexts in which the files *themselves* identified, at least inferentially, the individuals who could be endangered by disclosure. *See* Pet. App. 42a ("[V]irtually every court having occasion to interpret exemption 7(F) has been called upon to determine whether the disclosure of law enforcement records could reasonably be expected to endanger the life or physical safety of any individuals who participated in some way in the investigation, be they law enforcement employees, informants, or witnesses, or others associated in some way with those persons."); *id.* at 37a & n.12

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and local law enforcement officers"); *Malizia v. U.S. Dep't of Justice*, 519 F. Supp. 338, 351 (S.D.N.Y. 1981) (same for "the identities of DEA special agents"); *Nunez v. Drug Enforcement Admin.*, 497 F. Supp. 209, 212 (S.D.N.Y. 1980) (same for "the names of DEA personnel involved in the investigations in question"); *Ray v. Turner*, 468 F. Supp. 730, 737 (D.D.C. 1979) (same for "the name of a Customs Service agent"); *Shaver v. Bell*, 433 F. Supp. 438, 441 (N.D. Ga. 1977) (same for the "names and information that might lead to the identity of such law enforcement personnel"); *see also Fiumara v. Higgins*, 572 F. Supp. 1093, 1107 (D.N.H. 1983) ("Deletion of names and information that might lead to the identity of such law enforcement personnel may be appropriate.").

(citing cases).[10] Accordingly, the Second Circuit properly construed the 1986 amendments.[11]

In sum, the court of appeals correctly determined that Exemption 7(F)'s text, its statutory context, its legislative history, and the relevant case law do not support the government's construction of that provision. Consequently, the government has failed to present any basis for disturbing the court of appeals' well-reasoned decision.[12]

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[10] *See, e.g.*, *Rugiero v. U.S. Dep't of Justice*, 257 F.3d 534, 552 (6th Cir. 2001) (agency properly withheld "information about DEA agents"); *Antonelli v. Fed. Bureau of Prisons*, 623 F. Supp. 2d 55, 58 (D.D.C. 2009) ("In general, [Exemption 7(F)] has been interpreted to apply to names and identifying information of law enforcement officers, witnesses, confidential informants and other third persons who may be unknown to the requester. In reviewing claims under exemption 7(F), courts have inquired whether there is some nexus between disclosure and possible harm and whether the deletions were narrowly made to avert the possibility of such harm." (citations omitted)).

[11] The government cites three post-1986 district court cases in arguing for a "broader reach" for Exemption 7(F). Pet. 31. In none of those cases, however, did the court permit the withholding of records on the grounds that disclosure would be inflammatory and provoke violence by unspecified individuals against other unspecified individuals. *See also* Pet. App. 37a-41a.

[12] The government now contends that the Second Circuit's holding is "problematic" because that court did not remand to provide the government an opportunity to satisfy the specificity requirement of Exemption 7(F). Pet. 31 n.11. but the government had ample notice that its alternative construction of Exemption 7(F) was contrary to prevailing case law. Moreover, in proceedings before the district court, the government's counsel was specifically asked by the court if the military police depicted in the Abu Ghraib photographs were

II. GRANTING THE PETITION WOULD FURTHER DELAY THE DISCLOSURE OF RECORDS THAT ARE OF EXTRAORDINARY IMPORTANCE TO AN ONGOING NATIONAL DEBATE.

As this Court has recognized, "[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *Robbins Tire & Rubber Co.*, 437 U.S. at 242; *see also* Pet. App. 51a. The photographs at issue here are precisely the kinds of records that the statute was meant to address. They depict governmental misconduct of the gravest sort, "plac[ing] governmental accountability at the center of the dispute." Pet. App. 41a. The public interest in their disclosure is "significant," *id.* at 51a; *see also id.* ("The defendants concede that these photographs yield evidence of governmental wrongdoing . . . ."); Pet. 16 (acknowledging that "certain photographs at issue depict reprehensible conduct by American personnel"), particularly now as the nation debates whether to further investigate these and other similar abuses.

The government suggests that the disclosure of investigative files—which describe the images at

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"particularly in danger." C.A. App. 331. The court noted that there was "no indication in the record that suggested that was the case." *Id.* at 332. The government's counsel responded that "the sense of danger is broad . . . in terms of parsing out who might be in more danger than others, I don't know that we can fairly do that." *Id.*

issue here, Pet. 6 & n.5—satisfies its obligation under FOIA, *id.* at 15. FOIA does not permit the government to withhold records, however, simply because it believes that the public has enough information already. In any event, it is plain that textual descriptions of photographs are not a substitute for the photographs themselves. As the district court explained, "photographs present a different level of detail and a different medium, and are . . . better than testimony, which can be self-serving, better than summaries, which can be misleading, and better even than a full description no matter how complete that description might be." Pet. App. 122a; *see also Detroit Free Press, Inc. v. Dep't of Justice*, 73 F.3d 93, 98 (6th Cir. 1996) (noting that photographs of government misconduct can "serve to subject the government to public oversight" and "reveal . . . circumstances . . . in a way that written information cannot"). It is not surprising, therefore, that photographs have historically played an important role in drawing attention to abuses and advancing the cause of human rights throughout the world. Brief for Human Rights Watch et al. as Amici Curiae Supporting Respondents (Sept. 8, 2009) (No. 09-160). Here too, as the Second Circuit noted, release of the photographs may "deter[] the future abuse of prisoners." Pet. App. 58a.

In essence, the government contends that it should be entitled to withhold the best evidence of its own misconduct because that evidence may be inflammatory. FOIA, however, proceeds on the very different premise that an informed electorate is critical to democratic decision-making and the best

antidote to governmental abuse. As Justice Brandeis observed many years ago: "Sunlight is said to be the best of disinfectants." *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (quoting L. Brandeis, Other People's Money 62 (1933)). This Court should not further delay the disclosure of information that relates to governmental misconduct, that is crucial to an ongoing national debate, and that both the district court and the Second Circuit correctly concluded has been withheld unlawfully.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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No. 09-160

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF DEFENSE, ET AL.,
PETITIONERS

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS

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In the Supreme Court of the United States

No. 09-160

UNITED STATES DEPARTMENT OF DEFENSE, ET AL., PETITIONERS

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS

Pursuant to Rule 15.8 of the Rules of this Court, the Solicitor General, on behalf of the Department of Defense and the Department of the Army, files this supplemental brief to address the effect on this case of the Department of Homeland Security Appropriations Act, 2010 (Act), Pub. L. No. 111-83, 123 Stat. 2142, which was signed by the President on October 28, 2009, and a certification issued pursuant to Section 565 of that Act by the Secretary of Defense (Secretary) on November 13, 2009. Section 565 and the Secretary's certification are reproduced as appendices to this brief. The Act and the Secretary's certification require that the photographs currently at issue in this case be exempt from mandatory disclosure under the Freedom of Information Act (FOIA), 5 U.S.C. 552. The judgment of the court

of appeals therefore should be vacated and the case remanded to the court of appeals for further consideration in light of the new legislation and the Secretary's certification.

A. Respondents filed this action under FOIA in district court seeking the release of various agency records, including the 21 photographic records presently at issue, which relate to allegations of abuse and mistreatment of detainees in United States custody overseas. Pet. 3, 6-7 & n.5; Reply Br. 6 n.2. The 21 photographs, which were taken between 2002 and 2004 and are contained in files concerning investigations conducted by the Army's Criminal Investigation Command, depict detainees held in United States military custody in Iraq and Afghanistan. See Pet. App. 161a-162a, 169a-170a; Pet. 6-7; Reply Br. 6 n.2.

Petitioners argued, *inter alia*, that the photographs are exempt from mandatory disclosure under FOIA Exemption 7(F) because they are records compiled for law-enforcement purposes and their disclosure under FOIA "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. 552(b)(7)(F). The district court disagreed, found Exemption 7(F) inapplicable, and ordered petitioners to produce the 21 photographs under FOIA. Pet. App. 62a, 64a; see Pet. 4-5, 9.

The court of appeals affirmed. Pet. App. 1a-60a. The court accepted for the purpose of its opinion that disclosure of the 21 photographs could reasonably be expected to endanger the lives and physical safety of United States military and civilian personnel overseas. *Id.* at 10a n.3. The court nevertheless held that Exemption 7(F) did not exempt the photographs from mandatory disclosure because, in its view, Exemption 7(F) requires that the government "identify at least one individual with reasonable specificity and establish that disclosure of the documents could reasonably be expected to endanger that individual." *Id.* at

18a. Concluding that the government failed to "identify a single person and say that the release * * * could reasonably be expected to endanger that person's life or physical safety," the court found Exemption 7(F) inapplicable. *Ibid.*

B. 1. In response to the decision of the court of appeals, several legislative provisions were introduced in Congress to provide the Secretary with new authority to exempt from mandatory disclosure under FOIA detainee photographs such as those presently at issue. See Pet. 11 n.8. On October 28, 2009, the President signed into law the Department of Homeland Security Appropriations Act, 2010. Section 565 of that Act vests the Secretary with authority to issue a certification with respect to certain photographic records. If such a certification is issued, the covered records are not subject to disclosure under FOIA.

More specifically, Section 565(b) states that, "[n]otwithstanding any other provision of the law to the contrary, no protected document, as defined in subsection (c), shall be subject to disclosure under [FOIA] or any proceeding under [FOIA]." App., *infra*, 1a.

Section 565(c)(1) defines "protected document" to mean "any record" that is a photograph (1) taken between September 11, 2001 and January 22, 2009, that "relates to the treatment of individuals engaged, captured, or detained after September 11, 2001, by the Armed Forces of the United States in operations outside of the United States," (2) "for which the Secretary of Defense has issued a certification" under Section 565(d). App., *infra*, 1a-2a.

Section 565(d) states that "the Secretary of Defense shall issue a certification" with respect to such a photograph if the Secretary "determines that disclosure of that photograph would endanger citizens of the United States, members of the United States Armed Forces, or employees

of the United States Government deployed outside of the United States." App., *infra*, 2a.

Section 565 further provides that its provisions "shall take effect on the date of enactment," *i.e.*, October 28, 2009, and "apply to any protected document." App., *infra*, 3a (Section 565(f)).

2. On November 13, 2009, the Secretary personally exercised his certification authority under Section 565 with respect to a collection of photographs, including the 21 photographs now at issue before this Court and the 23 additional photographs identified in the decision of the court of appeals. App., *infra*, 4a-5a; cf. Pet. App. 6a & n.2 (discussing photographs).[1]

The Secretary's certification explains that the 44 photographs referred to by the court of appeals—*i.e.*, the 21 photographs that were the immediate subject of the government's appeal and the 23 other photographs noted by the court in its decision, see Pet. App. 6a & n.2—were taken between September 11, 2001 and January 22, 2009, and relate to the treatment of individuals engaged, captured, or detained after September 11, 2001, by the Armed Forces of the United States, in operations outside the United States. App., *infra*, 4a. The certification also states that the Secretary has "determined that public disclosure of these photographs would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United

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[1] The Secretary may, but did not in this case, delegate his certification authority under Section 565 to a subordinate official in the Department of Defense, including the Deputy Secretary of Defense. 10 U.S.C. 113(d) (authorizing the Secretary to delegate "any of his functions or duties" to such persons within the Department of Defense as he may designate "[u]nless specifically prohibited by law"); see 10 U.S.C. 132(b).

States." *Id.* at 4a-5a. Based on that determination, the Secretary has concluded that the photographs are "protected documents." *Id.* at 5a. Pursuant to Section 565, those documents are exempt from mandatory disclosure under FOIA. *Ibid.*

C. Section 565 and the Secretary's certification govern the disposition of this case. Congress provided that Section 565 would take effect upon enactment and specified that its provisions apply to "any protected document" in "any proceeding under [FOIA]." App., *infra*, 1a, 3a (Section 565(b) and (f)). Section 565 therefore authorizes the Secretary to exempt from mandatory FOIA disclosure any records in the present proceeding that qualify as "protected documents."[2] In light of the Secretary's certification, the 21 photographic records that the district court ordered disclosed and that are the subject of the government's petition for a writ of certiorari are "protected documents."

As explained in the government's petition and reply brief, plenary review by this Court was warranted before the intervening legislation because the court of appeals

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[2] Neither the Act nor the Secretary's certification implicates retroactivity concerns. See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 273 (1994) ("When [an] intervening statute authorizes or affects the propriety of prospective relief, application of the new provision" is "unquestionably proper" and "not retroactive."); *Southwest Ctr. for Biological Diversity* v. *United States Dep't of Agric.*, 314 F.3d 1060, 1061-1062 (9th Cir. 2002) (holding that Congress's enactment of a statutory provision authorizing the withholding of information in response to a FOIA request applies to pending FOIA proceedings even when Congress did not clearly express its intent to apply the provision to pending cases); cf. *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 226 (1995) (Congress may alter operative law to govern cases still pending on appellate review.); *Miller* v. *French*, 530 U.S. 327, 347-348 (2000) (Congress may modify the prospective operation of an injunctive order even after the order has become final and unreviewable.).

erred in engrafting on to Exemption 7(F) an extra-textual requirement of victim specificity. Pet. 16-30; Reply Br. 2-10. The court of appeals' error was particularly significant in light of the conclusion of the President and the Nation's highest-ranking military officers that disclosure of the photographs at issue would pose a significant risk to American military and civilian personnel overseas. Pet. 14-15, 30-32; Reply Br. 10.

But given Congress's enactment of intervening legislation resolving the present dispute by providing for withholding of the records at issue, the Court now has no occasion to address the proper construction of Exemption 7(F) as set forth in the government's petition. The appropriate disposition, after these events, is for this Court to grant the certiorari petition, vacate the judgment of the court of appeals, and remand for further proceedings (GVR) in light of the intervening legislation. See *Lords Landing Vill. Condo. Council of Unit Owners* v. *Continental Ins. Co.*, 520 U.S. 893, 896 (1997) (per curiam) (GVR order appropriate where intervening developments give rise to reasonable probability that lower court's judgment would change if it were "given the opportunity for further consideration"); *Lawrence* v. *Chater*, 516 U.S. 163, 166-167 (1996) (per curiam) (explaining that this Court has ordered GVR for a "wide range of developments" including "new federal statutes"); *id.* at 182 (Scalia, J., dissenting) (noting the Court's practice of vacating in light of intervening statute).

This Court has decided in numerous cases affected by intervening legislation to grant certiorari, vacate the judgment of the lower court, and remand to allow the lower court to consider the effect of the new legislation in the first

instance.[3] Indeed, in circumstances analogous to those here, the Court granted, vacated, and remanded to permit further consideration of a FOIA disclosure order in light of intervening legislation that directed that no statute shall be construed to require the disclosure of certain tax-return processing information when the Secretary of the Treasury determines that such disclosure would seriously impair assessment, collection, or enforcement under the internal revenue laws. See *Bureau of Econ. Analysis* v. *Long*, 454 U.S. 934 (1981) (GVR in light of Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 701, 95 Stat. 340 (amending 26 U.S.C. 6103(b)(2)), vacating *Long* v. *Bureau of Econ. Analysis*, 646 F.2d 1310 (9th Cir.) (affirming FOIA disclosure order)). Cf. *Department of Justice* v. *City of Chi.*, 537 U.S. 1229 (2003) (vacating and remanding in FOIA case for further consideration in light of intervening legislation after having granted certiorari to review *City of Chicago* v. *United States Department of Treasury*, 287 F.3d 628 (7th Cir.), amended, 297 F.3d 672 (7th Cir. 2002)). The same disposition is appropriate here.

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[3] See, *e.g.*, *Diawara* v. *Gonzales*, 546 U.S. 1086 (2006); *American Bible Soc'y* v. *Richie*, 522 U.S. 1011 (1997); *Doherty* v. *Pennington*, 522 U.S. 909 (1997); *K.R.* v. *Anderson Cmty. Sch. Corp.*, 521 U.S. 1114 (1997); *American Life & Cas. Ins. Co.* v. *Trostel*, 519 U.S. 1104 (1997); *Fields* v. *Battle*, 519 U.S. 801 (1996); *Dennler* v. *Trippet*, 503 U.S. 978, amended, 503 U.S. 1003 (1992); *Holland* v. *First Va. Banks, Inc.*, 502 U.S. 1086 (1992); *INS* v. *National Ctr. for Immigrants' Rights*, 481 U.S. 1009 (1987); see also *Heckler* v. *Lopez*, 469 U.S. 1082 (1984) (GVR with instructions in light of intervening legislation); cf. *Mouelle* v. *Gonzales*, 548 U.S. 901 (2006) (GVR for intervening regulatory provision); *Long Island Care at Home, Ltd.* v. *Coke*, 546 U.S. 1147 (2006) (same); *Slekis* v. *Thomas*, 525 U.S. 1098 (1999) (same).

* * * * *

For the foregoing reasons, the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for further consideration in light of Section 565 of the Department of Homeland Security Appropriations Act, 2010, and the certification by the Secretary of Defense pursuant to that provision.

Respectfully submitted.

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NOVEMBER 2009

APPENDIX A

1. The Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, 123 Stat. 2142, provides in pertinent part:

SEC. 565. (a) SHORT TITLE.—This section may be cited as the "Protected National Security Documents Act of 2009".

(b) Notwithstanding any other provision of the law to the contrary, no protected document, as defined in subsection (c), shall be subject to disclosure under section 552 of title 5, United States Code or any proceeding under that section.

(c) DEFINITIONS.—In this section:

(1) PROTECTED DOCUMENT.—The term "protected document" means any record—

(A) for which the Secretary of Defense has issued a certification, as described in subsection (d), stating that disclosure of that record would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States; and

(B) that is a photograph that—

(i) was taken during the period beginning on September 11, 2001, through January 22, 2009; and

(ii) relates to the treatment of individuals engaged, captured, or detained after September 11, 2001, by the Armed Forces of the United

States in operations outside of the United States.

(2) PHOTOGRAPH.—The term "photograph" encompasses all photographic images, whether originals or copies, including still photographs, negatives, digital images, films, video tapes, and motion pictures.

(d) CERTIFICATION.—

(1) IN GENERAL.—For any photograph described under subsection (c)(1), the Secretary of Defense shall issue a certification if the Secretary of Defense determines that disclosure of that photograph would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States.

(2) CERTIFICATION EXPIRATION.—A certification and a renewal of a certification issued pursuant to subsection (d)(3) shall expire 3 years after the date on which the certification or renewal, is issued by the Secretary of Defense.

(3) CERTIFICATION RENEWAL.—The Secretary of Defense may issue—

(A) a renewal of a certification at any time; and

(B) more than 1 renewal of a certification.

(4) NOTICE TO CONGRESS.—The Secretary of Defense shall provide Congress a timely notice of the Secretary's issuance of a certification and of a renewal of a certification.

(e) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to preclude the voluntary disclosure of a protected document.

(f) EFFECTIVE DATE.—This section shall take effect on the date of enactment of this Act and apply to any protected document.

APPENDIX B

CERTIFICATION OF THE SECRETARY OF DEFENSE

This certification pertains to a collection of photographs (as that term is defined in Section 565(c)(2) of the Department of Homeland Security Appropriations Act, 2010 (Pub. L. 111-83) ("DHS Appropriations Act")) assembled by the Department of Defense that were taken in the period between September 11, 2001 and January 22, 2009, and that relate to the treatment of individuals engaged, captured or detained after September 11, 2001 by the Armed Forces of the United States in operations outside the United States. These photographs are contained in, or derived from, records of investigations of allegations of detainee abuse, including the records of investigation processed and released in *American Civil Liberties Union* v. *Department of Defense*, 04 Civ. 4151 (AKH) (S.D.N.Y.). The photographs include but are not limited to the 44 photographs referred to in the decision of the United States Court of Appeals for the Second Circuit in *American Civil Liberties Union* v. *Department of Defense*, 543 F.3d 59, 65 & n.2 (2d Cir. 2008), petition for cert. filed, 78 U.S.L.W. 3083 (Aug. 7, 2009) (No. 09-160).

Upon the recommendations of the Chairman of the Joint Chiefs of Staff, the Commander of U.S. Central Command, and the Commander of Multi-National Forces-Iraq, and by the authority vested in me under Section 565(d)(1) of the DHS Appropriations Act, I have determined that public disclosure of these photographs would endanger citizens of the United States, members of the United States Armed Forces, or employees of the

United States Government deployed outside the United States.

Therefore, these photographs meet the standard for protected documents, as that term is defined in section 565(c)(1) of the DHS Appropriations Act and are exempt from disclosure under the Freedom of Information Act, 5 U.S.C § 552, and in all proceedings pursuant to that law. As required by Section 565(d)(4) of the DHS Appropriations Act, I hereby direct that notice of this Certification be provided to Congress.

Date: 11/13/09 /s/ ROBERT M. GATES
Secretary of Defense

(8)

No. 09-160

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IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF DEFENSE, ET AL.,

Petitioners,

—v.—

AMERICAN CIVIL LIBERTIES UNION, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Sup. Ct. R. 15.8 1

Pursuant to Rule 15.8 of the Rules of this Court, Respondents file this supplemental brief to oppose the government's request that this Court grant the certiorari petition, vacate the Second Circuit's decision, and remand for further proceedings. As set forth more fully below, the Court should simply deny the government's petition for a writ of certiorari, leaving undisturbed the unanimous and well-reasoned decision of the appeals court. The government may then raise its new claim of withholding—a claim based upon a new statute unrelated to the legal basis for the Second Circuit's decision—in the district court pursuant to Rule 60 of the Federal Rules of Civil Procedure.

SUPPLEMENTAL STATEMENT

This case concerns the public's right to know about the treatment of prisoners held by the U.S. government overseas. It arises from requests filed by Respondents under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, after news organizations reported that prisoners held by the Department of Defense and Central Intelligence Agency had been abused, tortured, and in some cases killed in custody. Respondents' FOIA requests, filed in October 2003 and May 2004, sought records concerning the "treatment of Detainees" held by the United States overseas, the "deaths of [such] Detainees" in custody, and the "rendition of Detainees and other individuals" to countries known to use torture. Respondents commenced the instant litigation in June 2004 to enforce their FOIA requests.

Among the records responsive to Respondents' FOIA requests are forty-four images—plus an unspecified but "substantial number" of additional images, Pet. App. 185a—depicting the mistreatment of detainees held in at least seven different locations in Afghanistan and Iraq. On September 22, 2008, a unanimous panel of the Second Circuit ordered the government to disclose a subset of these photographs.[1] It rejected the government's invocation of FOIA Exemption 7(F), 5 U.S.C. § 552(b)(7)(F) holding that the government must do more to satisfy the narrow law-enforcement exemption than "point to a group composed of millions of people and establish that it could reasonably be expected that someone in that group will be endangered" by disclosure. Pet. App. 11a.

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[1] On September 29, 2005, the district court ordered the disclosure of images of detainee abuse taken by Joseph Darby at Abu Ghraib prison. Pet. App. 74a, 110a-133a. The government appealed from that judgment, but the parties stipulated to the dismissal of the appeal after the images at issue were published by a news organization. *Id.* at 66a-67a. The government subsequently identified twenty-one additional responsive images, *id.* at 61a-62a, 67a, and agreed that the disclosure or withholding of those images "based on FOIA Exemptions 6, 7(C), and/or 7(F)," as well as any photos subsequently withheld on the same bases, would be governed by the final ruling on appeal as to the twenty-one images at issue here, *id.* at 69a. The district court ordered the disclosure of the twenty-one images on June 21, 2006. *Id.* at 61a-62a. On June 29, 2006, the government informed Respondents that it possessed an additional twenty-three images responsive to Respondents' requests, *id.* at 6a n.2, and on May 28, 2009, it acknowledged the existence of an unspecified but "substantial number" of additional responsive images, *id.* at 185a.

In response to the Second Circuit's disclosure order, Congress passed and the President signed the Protected National Security Documents Act of 2009, Pub. L. No. 111-83, § 565, 123 Stat. 2142, 2184-86. The Act authorizes the withholding of certain records otherwise subject to disclosure under FOIA. Specifically, subsection (b) of the Act states that "no protected document, as defined in subsection (c), shall be subject to disclosure under [FOIA] or any proceeding under [FOIA]." Subsection (c), in turn, defines "protected document" to mean any photograph: (1) that "was taken during the period beginning September 11, 2001, through January 22, 2009," (2) that "relates to the treatment of individuals engaged, captured, or detained after September 11, 2001, by the Armed Forces of the United States in operations outside of the United States," and (3) "for which the Secretary of Defense has issued a certification, as described in subsection (d), stating that disclosure of that record would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States."

Subsection (d) states that "the Secretary of Defense shall issue a certification" for any such photograph if the Secretary "determines that disclosure of that photograph would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States."

On November 13, 2009, the Secretary of Defense issued a certification under the Act with respect to "a collection of photographs . . . assembled by the Department of Defense that were taken in the period between September 11, 2002 and January 22, 2009, and that relate to the treatment of individuals engaged, captured or detained after September 11, 2001 by the Armed Forces of the United States in operations outside the United States." The certification states that "[t]hese photographs are contained in, or derived from, records of investigations of allegations of detainee abuse," and that the Secretary has "determined that public disclosure of these photographs would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States."

On the same day, the government filed a supplemental brief apprising the Court of the certification and requesting that, in light of the certification, the Court grant the certiorari petition, vacate the Second Circuit's decision, and remand for further proceedings.

ARGUMENT

As explained in Respondents' Brief in Opposition, the Second Circuit correctly determined that FOIA Exemption 7(F) does not authorize the government to withhold prisoner-abuse photographs based upon a general assertion that release of the photographs could provoke a violent response. The government now seeks to avoid disclosure of the

photographs by invoking a new and wholly unrelated statute, and it asks that the Court first grant the certiorari petition, vacate the Second Circuit's decision, and remand for further proceedings ("GVR"). Respondents agree that the lower courts should address the government's new argument in the first instance; however, where, as here, the intervening statute does not undermine or bear upon the lower court's decision, and the lower court's decision is correct, the Court should simply deny the petition for a writ of certiorari, allowing the government to raise its new claim in the district court pursuant to Rule 60 of the Federal Rules of Civil Procedure.

The primary inquiry underlying this Court's "sparing[]" exercise of its authority to issue a GVR order is: whether intervening developments "reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence v. Chater*, 516 U.S. 163, 167, 173 (1996); *Lords Landing Vill. Condo. Council of Unit Owners v. Cont'l Ins. Co.*, 520 U.S. 893, 896 (1997). That condition is not satisfied here. The Second Circuit's decision concerned the government's reliance upon Exemption 7(F). The intervening statute and certification by the Secretary do not call into question the validity of that decision. They merely raise the independent question of whether suppression of the photographs is now proper pursuant to the Secretary's certification. Thus, the intervening event is unrelated to the underlying decision and does not warrant a GVR order.

"Whether a GVR order is ultimately appropriate depends further on the equities of the case . . . ." *Lawrence*, 516 U.S. at 167-68. The equities in this case also counsel against the relief the government seeks. Denying the government's petition for a writ of certiorari, in lieu of issuing a GVR order, would not prejudice the government's ability to argue before the lower courts that withholding of the photographs is now proper pursuant to the Act and the Secretary's certification. *See* Fed. R. Civ. P. 60. Vacating the Second Circuit's decision would, however, needlessly impair Respondents' ability to rely on the Second Circuit's sound interpretation of Exemption 7(F) should another controversy arise in this long-running and wide-ranging FOIA litigation that does not involve photos or that involves photos that the Secretary has not certified under the new legislation. Likewise, a GVR order would vitiate the precedential impact of the Second Circuit's decision for other litigants and courts in FOIA disputes that have nothing to do with the subjects covered by the Protected National Security Documents Act of 2009, which the government seeks to invoke here. *Cf. U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26-27 (1994) ("'Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur.'" (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 40 (1993) (Stevens, J., dissenting))).

Accordingly, the Court should deny the government's petition for a writ of certiorari. The government will then remain free, if it chooses, to seek further relief from the district court pursuant to Rule 60 of the Federal Rules of Civil Procedure.

CONCLUSION

For the reasons stated herein, and in Respondents' Brief in Opposition, the petition for a writ of certiorari should be denied.

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November 17, 2009

No. 09-160

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF DEFENSE, ET AL.,
PETITIONERS

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

The court of appeals has affirmed an order directing the public disclosure of records that, in the judgment of the President of the United States and the Nation's highest-ranking military officers responsible for ongoing combat operations in Iraq and Afghanistan, would pose a significant risk to the lives and physical safety of United States and Coalition personnel. Respondents do not dispute the accuracy of that judgment. Indeed, respondents' brief in opposition, like the decision of the court of appeals (Pet. App. 9a-10a & n.3), assumes that the court-ordered disclosure in this case "could reasonably be expected to endanger" the lives and physical safety of many individuals, both military and civilian, overseas. 5 U.S.C. 552(b)(7)(F). Respondents nonetheless contend that disclosure is required. They defend the Second Circuit's interpretation of Exemp-

tion 7(F)—which applies when the disclosure of law-enforcement records "could reasonably be expected to endanger the life or physical safety of any individual" (*ibid.*)—on the ground that the words "any individual" require the government to "identify at least one individual with reasonable specificity" and show that disclosure "could reasonably be expected to endanger that individual," Pet. App. 18a. That novel restriction cannot be squared with Exemption 7(F)'s text, purpose, or legislative history. Pet. 16-30.

Exemption 7(F) broadly encompasses danger to "any individual," with no suggestion of the Second Circuit's extra-textual specificity requirement. Respondents quote extensively from the court of appeals' decision but ignore much of the government's petition showing the court's statutory construction to be flawed. Indeed, their own defense of the court's decision underscores several of its analytical errors. Those errors, if uncorrected, would place American personnel at significant risk of death and injury. Before those risks are borne by the Nation's service members and others in harm's way, this Court should review the decision of the court of appeals.

1. As the petition explains (Pet. 16-25), nothing in Exemption 7(F) supports the court of appeals' requirement that the government "identify at least one individual with reasonable specificity" and show that disclosure "could reasonably be expected to endanger that individual," Pet. App. 18a.

a. Respondents contend (at 9-10) that the court's victim-specificity requirement is necessary to give content to "any individual." But that phrase *has* content—just not the content that the court of appeals imported. Congress exempted from FOIA's requirements certain records whose disclosure would imperil the "life or physical safety" of "any" natural person (*i.e.*, "individual"), not some partic-

ular person or subcategory of persons. That conclusion is reinforced by Congress's decision in 1986 to substitute "any individual" for the prior term "law enforcement personnel" (5 U.S.C. 552(b)(7)(F) (1982))—an amendment designed to expand Exemption 7(F)'s protection from only some individuals to all individuals facing serious danger. Pet. 20-21, 26, 28.

Respondents quote (at 10-11) the court of appeals' statement that its victim-specificity requirement is appropriate because it results in a "narrower construction" of Exemption 7(F). That reasoning is doubly flawed. It ignores the "practical approach" required by this Court to give FOIA's exemptions "meaningful reach and application." Pet. 23-24. And critically, the court's reasoning fails to ground the interpretation of Exemption 7(F) in FOIA's text. Even respondents admit (at 10 n.7) that Exemption 7(F) does not require at-risk individuals to be "named" because the relevant statutory language does "not read 'any *named* individual.'" Respondents fail to recognize that restricting the exemption to "any *named* individual" is a "narrower construction" in precisely the same way that limiting it to "any *identifiable* individual" is. Neither restriction has any foundation in the words of the statute.

Moreover, Congress's explicit focus on "identifiable individual[s]" in the Privacy Act (Pet. 18) and Congress's emphasis elsewhere in FOIA Exemption 7 on the "identity" of individuals who are confidential sources, 5 U.S.C. 552(b)(7)(D), confirm that Congress's use of the term "any individual"—without textual qualification—is not limited to at-risk individuals who are "identifiable" in advance. Cf. *CIA* v. *Sims*, 471 U.S. 159, 169 n.13 (1985) (similarly relying on Privacy Act to construe FOIA). Respondents do not respond to those arguments.

Notably, respondents do not dispute that the ordinary meaning of "any" is expansive (Pet. 17), arguing instead (at 14-15) that the Court has interpreted the word "in a limited manner where the context has *so demanded*." Br. in Opp. 15 n.8 (emphasis added). Yet respondents fail to explicate what aspects of the context of Exemption 7(F) call for imposing an extra-textual restriction on the statute's natural, capacious meaning. In these circumstances, this Court should reject both respondents' and the Second Circuit's efforts to redefine the meaning of the word "any."

b. Respondents contend (at 11-14) that the court of appeals' interpretation is justified because it prevents the government from circumventing the "safeguards and standards" necessary to withhold documents under FOIA Exemption 1, 5 U.S.C. 552(b)(1), which applies to classified records. Respondents assert (at 13) that the government's interpretation of Exemption 7(F) would improperly establish "a different, much lower standard for withholding information on national security grounds" than Exemption 1 does. That contention is meritless.

First, respondents' premise is wrong. The government here is not withholding records "on national security grounds." It is withholding records under Exemption 7(F) because their disclosure reasonably could be expected to endanger the lives and physical safety of individuals. That is a basis for withholding distinct from harm to the "national security" that would warrant classification under Executive Order 12,958 and withholding under Exemption 1. Accordingly, Exemption 7(F) often will apply when Exemption 1 does not, and vice versa. The question at issue is not whether the photographs meet the requirements of the classification Executive Order regarding national security, but instead whether the disclosure of those photographs

will endanger individuals. That is precisely the harm Exemption 7(F) addresses.

Moreover, this Court has declined to read Exemption 1 to restrict the scope of FOIA's other exemptions. In *Sims*, the Court construed Exemption 3, 5 U.S.C. 552(b)(3), to permit the CIA to withhold records concerning intelligence sources and methods even though the government had *declined* to reclassify the (then-declassified) records to trigger Exemption 1. See 471 U.S. at 166-177; see also *id.* at 184 n.3 (Marshall, J., concurring in the result). Justice Marshall specifically advocated interpreting Exemption 3's scope in light of Exemption 1, and stated that the Court's contrary reading "enables the [government] to avoid making the showing required under the carefully crafted balance embodied in Exemption 1 and thereby thwarts Congress's effort to limit the [government's] discretion." *Id.* at 189; see *id.* at 182-193. Seven Members of the Court were unpersuaded by that argument, which respondents repackage here. Nothing in Exemption 1 warrants restricting or otherwise altering Exemption 7(F)'s scope as written. See Pet. 25.[1]

2. Respondents contend (at 8, 17) that the government's interpretation of Exemption 7(F) would "turn FOIA on its head" by providing "the greatest protection against disclosure to records that depict the most egregious

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[1] Respondents' view (at 12) that the government's reading would improperly permit the government to evade the "safeguards and standards" for classification is also undermined by the ability of the Executive to change those standards. Exemption 1 authorizes the Executive to determine the "criteria" for classifying information by "Executive order." 5 U.S.C. 552(b)(1). Because Exemption 1 does not preclude the Executive from changing the criteria for classification, the standards existing at any given time are an inappropriate guide for interpreting other FOIA exemptions.

abuses." To the contrary, the government insists on nothing more than that Exemption 7(F) applies when the requisite risk of death or physical injury is present. The danger to lives and safety that triggers the exemption may or may not be correlated with governmental misconduct. And, in any event, the court of appeals' decision itself does not turn on the degree of governmental misconduct, but instead would authorize withholding regardless of this factor so long as an agency can identify at-risk individuals with reasonable specificity. Respondents' apparent support for a balancing approach that would weigh the asserted public interest in revealing government misconduct against the risk of harm resulting from disclosure thus finds as little support in the approach of the Second Circuit as in the text of the statute. See Pet. App. 5a, 40a (rejecting balancing approach).[2]

The court of appeals' insistence on identification of at-risk individuals imposes a limitation on Exemption 7(F)'s protective scope similar to the one Congress eliminated from the statute in 1986. Pet. 26; cf. 130 Cong. Rec. 3502 (1984) (statement of Sen. Hatch). Both respondents and the court of appeals fail to explain why Congress would have wanted to protect only those victims who are identifiable in advance. Congress made clear that the standard in Exemption 7(F)—"could reasonably be expected to endanger"—establishes "the degree of risk of harm from disclosure which must be shown to justify withholding." S. Rep. No. 221, 98th Cong., 1st Sess. 23 (1983); see Pet. 18-19; cf.

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[2] The public interest in disclosure here, moreover, is diminished by the public disclosure of the Army's underlying investigatory reports for all 21 responsive photographs at issue. Pet. 6-7 & nn.4-5, 15. (The petition (at 6) contains a typographical error and should state that "[a]ll 21 photographs," rather than "[a]ll 29 photographs," are in reports that were publicly released with redactions.).

Pet. App. 33a n.10. So long as a FOIA disclosure sufficiently risks the lives or physical safety of individuals under that standard, the matter of prior identification is irrelevant: Congress would have had no reason to protect individuals whom a federal agency could identify in advance with "reasonable specificity" while disregarding the dangers to individuals not specifically identifiable when Exemption 7(F) is invoked. Insofar as the purpose of the Exemption is concerned, identifiable and non-identifiable victims are identically situated. It therefore is not surprising that Congress declined to distinguish between them.

Significantly, respondents do not dispute that the Second Circuit's reasoning would require the disclosure of records *certain* to cause the death of numerous individuals if an agency were unable to identify the individual victims sufficiently in advance. Pet. 16-17. The Congress that enacted broad protection for the life and safety of "any individual" would not have countenanced that result. See Pet. 26-27, 30 (explaining that the 1986 amendment was intended to protect "anyone" whose life or physical safety was sufficiently endangered).

3. Respondents' reliance on legislative history is unavailing. Respondents claim that Congress intended Exemption 7(F) to protect against "specific threats to particular individuals arising out of law enforcement investigations." Br. in Opp. 18 (quoting Pet. App. 24a)[3]. But the 1986 amendment to Exemption 7(F) specifically deleted its prior textual restriction to law enforcement personnel,

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[3] Respondents heavily rely (at 19-20) on legislative statements regarding the need to protect "informants." Such statements, however, concern amendments to a different subparagraph of Exemption 7—Exemption 7(D)—which Congress modified to provide greater protection for informants than Exemption 7(F)'s protection for individuals generally. See 132 Cong. Rec. 26,769, 26,771, 29,619 (1986).

making clear that Congress wanted Exemption 7(F)'s safeguarding of life and physical safety to extend beyond individuals with a "law enforcement" connection. Exemption 7(F), as its history reflects, is intended to protect "anyone" subject to a sufficient risk of harm from disclosure of the records it covers. Pet. 26-28.

Moreover, the court of appeals' extra-textual requirement of victim specificity does not follow from respondents' apparent view (at 18) that Congress intended to focus on protecting "persons associated with law enforcement investigations." The court's victim-specificity requirement is orthogonal to respondents' focus on victims associated with law enforcement: The court's requirement would encompass some but not all of those victims, as it would include some but not all victims having no relationship to law enforcement.

Respondents' assertion (at 21) that Congress intended its 1986 amendments to have only a "limited effect" on the scope of Exemption 7(F) does not withstand scrutiny. The full statement of the Deputy Attorney General from which respondents quote in fact supports the government's position. Deputy Attorney General Carol Dinkins was not addressing Exemption 7(F), but instead Exemption 7 more generally when she said the statutory language would be "modified slightly," and she was referring to the scope of two amendments unrelated to the language in dispute between the parties here. 131 Cong. Rec. 248 (1985) (discussing S. 774, 98th Cong., 1st Sess. (1983)). The Deputy Attorney General made clear that FOIA reflects a "balance" in which the "interest in protecting [certain] information from disclosure often can be even more important" than "the goal of openness," and she therefore specifically recommended, in another part of her statement, an amendment to Exemption 7(F) to expand its protection for "law enforce-

ment" personnel to give "similar protection to the life of *any other person*." *Id.* at 247-248, 253 (emphasis added). That broader understanding of Exemption 7(F) is repeatedly reflected in statements of former Attorneys General while the amendment was under consideration and in authoritative guidance provided after enactment. Pet. 26-27, 29-30. Respondents disregard all those statements.

Respondents' reliance (at 21) on the remarks of Representative English, who supported less expansive amendments than Congress ultimately adopted, are of little use in interpreting Exemption 7(F).[4] After those remarks, Senator Hatch—the "principal author" and sponsor of the Exemption 7 amendments—emphasized that "[t]here should be no misunderstanding" that the relevant amendments "are intended to broaden the reach of this exemption" and "ease considerably [the government's] burden in invoking it." 132 Cong. Rec. 31,423-31,424 (1986); see Pet. 23-24.

4. Respondents' observation (at 21-24) that most Exemption 7(F) cases have involved records identifying the individuals at risk from disclosure provides no support for the Second Circuit's decision to require reasonably specific victim identification in every case. And indeed, respondents' treatment of the cases presenting Exemption 7(F) questions similar to the issue presented here reinforces the conclusion that the Second Circuit's imposition of this requirement is unprecedented. Pet. 30-31. The best respondents can do is to label one decision "anomalous" (while identifying no contrary authority) and state that other rulings are factually different. Br. in Opp. 21, 24 n.11. But in

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[4] See 132 Cong. Rec. 29,616 (1986) (statement of Rep. English) (stating that he was "not in complete agreement with the Senate changes" to the bill, "would not have chosen this time or this bill" to amend FOIA, and believed concerns voiced by the Department of Justice "about the negative effects of the FOIA were greatly exaggerated").

all those prior cases, courts have held Exemption 7(F) to apply when the government sufficiently established that disclosure could reasonably be expected to endanger the lives and safety of individuals—without requiring the at-risk individuals to be identified in advance with reasonable specificity. That central holding of the cases, which respondents do not contest, is what makes those cases relevant to the dispute at issue here.

5. Respondents ultimately rest on the contention (at 25-27) that further review should be denied because it will delay public disclosure of the photographs at issue. Yet respondents do not dispute that lives are at risk from disclosure, nor do they disavow the court of appeals' assumption (at least for purposes of this appeal) that the government sufficiently established the threshold level of danger to trigger Exemption 7(F). Especially in light of this danger of death and injury, respondents' assertion that certiorari should be denied because of the normal delay associated with this Court's review is seriously mistaken.

This litigation has been pending for five years and was argued on appeal nearly three years ago. The relatively short additional time associated with review by this Court is fully warranted given the stakes. Even the court of appeals appears to have rejected respondents' claimed injury from delay, ordering its mandate to be recalled and held pending this Court's resolution of the present petition. Pet. 14.

The importance of this case and the need for further review are apparent. The President of the United States and the Nation's top military officers have concluded that the disclosure ordered here would significantly risk the lives and safety of American and Coalition personnel and civilians. Before those individuals are forced to bear that risk, this Court's review is warranted.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

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No. 09-160

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF DEFENSE, ET AL.,
PETITIONERS

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR HUMAN RIGHTS WATCH, THE INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, AND AMNESTY INTERNATIONAL AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the government can lawfully rely on Exemption 7(F) of the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(F), to withhold photographs depicting the abuse of prisoners held in U.S. custody without identifying with reasonable specificity any individuals who could reasonably be expected to be endangered by the photographs' release.

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae Human Rights Watch (HRW) is one of the leading independent organizations dedicated to defending and protecting the human rights of people around the world. For over 30 years, HRW has investigated and exposed human rights violations and challenged governments and international tribunals to end abusive practices, respect human rights, and hold abusers accountable for their actions.

To fulfill its mission, HRW investigates allegations of abuse in the United States and throughout the world by gathering information from governmental and other sources, interviewing witnesses, and issuing detailed reports. Where abuse of human rights has been found, HRW advocates for the victims before governmental officials and in the court of public opinion. For example, recent reports issued by HRW document: the disproportionate infliction of corporal punishment on students with disabilities in the United States; the abusive use of religious counseling, indefinite detention and flawed trials in Saudi Arabia's counterterrorism program; harm to Israeli civilians from rocket attacks launched by Palestinian

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members or their counsel made a monetary contribution to its preparation or submission. Both petitioners and respondents have consented to the filing of this brief. Petitioners' and respondents' written consents to the filing of this brief have been filed with the Clerk. Counsel of record for petitioners and respondents received notice of *amici*'s intent to file this brief more than ten days before the due date.

armed groups in Gaza; dysfunction, abuse and impunity in the police forces of India; institutionalized discrimination against gays and lesbians in Burundi; arbitrary killings by security forces in Nigeria; and the failure to test thousands of rape kits collected from victims of sexual assaults in Los Angeles, California.

Amicus curiae International Center for Transitional Justice (ICTJ) was established in the spring of 2001 to assist countries pursuing accountability for mass atrocities or human rights abuses, as well as unresolved historical injustices or systemic abuse, in order to further peace, justice and democratic objectives. Transitional justice encompasses five key approaches to achieving accountability: prosecuting perpetrators, documenting violations, reforming institutions, compensating victims and facilitating reconciliation. Working in societies newly emerging from repressive regimes and armed conflicts, as well as established democracies with unresolved histories of past injustices, ICTJ works to provide comparative information, legal and policy analyses, documentation and strategic research to local governmental and nongovernmental institutions and organizations on the policies and practice of transitional justice approaches. While ICTJ does not itself engage in documenting human rights abuses, its work supports those who are seeking to uncover the truth about what happened as an important step toward accountability.

In 2008, ICTJ launched its U.S. Accountability Project to promote in the United States the same emphasis on truth and accountability that ICTJ has brought to more than 30 countries around the world.

Along with other organizations, ICTJ called upon the President of the United States to assure that all federal departments and agencies comply fully with the letter and spirit of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and joined with respondent American Civil Liberties Union and others in seeking the release of additional photographs of mistreatment of detainees as the first step in the process of achieving justice for the victims of such abuse.

Amicus curiae Amnesty International (AI) is a worldwide movement of people who campaign for internationally recognized human rights. AI conducts research into abuses of human rights and publicizes its findings to 2.2 million members, supporters and subscribers in over 150 countries, who mobilize public pressure to demand that all governments respect the rule of law. For example, AI has led international campaigns to stop violence against women, defend the rights and dignity of those trapped in poverty, abolish the death penalty, oppose torture, free prisoners of conscience, protect the rights of refugees and immigrants, and regulate the global arms trade.

AI makes extensive use of photographic, video and audio evidence to support its campaigns against human rights abuses. Recently, for example, AI published photographs and testimonies showing the injuries and beatings inflicted by Honduran police on peaceful protesters in Tegucigalpa in response to the military-backed coup in June of this year.

Amici's Reliance On Visual Media And FOIA

Visual media constitute an essential component of *amici*'s fact-gathering and advocacy missions.

Photographic evidence is often the most compelling and unassailable proof of official wrongdoing, as well as the most effective means to convey to the public the magnitude of the offenses and to mobilize public opinion and support to effectuate change. In addition to detailed written reports, therefore, *amici* also issue video and audio files and photo essays, proving in ways that cannot be achieved with mere narrative the impact and scope of the offenses uncovered.

FOIA is an important tool for human rights organizations. Campaigns for human rights rely on meticulous research. Information in United States government files, including law enforcement files, is a crucial resource in this process. FOIA stands virtually alone in the world as the embodiment of a national commitment to governmental transparency and accountability. Access to information that could prove embarrassing to the Federal Government is critical to the process of holding officials accountable for their actions. The exemption to disclosure that petitioners Department of Defense and Department of the Army (collectively, the Government) seek to obtain in this action strikes at the heart of the mission pursued by HRW, ICTJ, AI and other human rights organizations, both domestically and internationally.

Amici harbor no illusions about the capacity of evil people to perform heinous acts. Indeed, it is precisely because *amici* have dedicated themselves to the task of shining a light on abuses of human rights that have been breathtaking in their depravity that they view with such alarm the broad—virtually boundless—exception that the Government here seeks to carve out of FOIA. The Government seeks

to withhold photographs depicting wrongdoing because it fears that extremists will seize on the photographs as an excuse to perform violent acts. Those who engage in acts of violence and cruelty do not need excuses. They need secrecy.

In furtherance of their mission to advance the cause of human rights and to hold accountable those who have abused human rights, *amici* urge the Court to deny the Government's petition for a writ of certiorari.

SUMMARY OF ARGUMENT

Photographic evidence can be a particularly effective means of telling the stories of victims of human rights abuse, and of galvanizing public opinion to support efforts to deter such conduct and, when it occurs, to hold abusers accountable for their actions. *Amici* and other human rights organizations rely on pictures along with other evidence to further their missions. Many advances in human rights, at home and abroad, can be traced, at least in part, to information conveyed through pictures along with narrative accounts, statistics, and other forms of information. Were the Government to succeed in its efforts to withhold the photographs at issue in this case based on its extraordinarily expansive reading of Exemption 7(F), the resulting harm to the advancement of the cause of human rights would be incalculable.

Indeed, were the Government to succeed in its argument in this case, Exemption 7(F) would swallow the rule. The Government does not (and could not) claim that there is any separate or special provision in FOIA regarding the disclosure of pictures. Accordingly, any reading of Exemption 7(F) that is broad

enough to encompass the pictures the Government wants to hide in this case would necessarily cover information in any form—text, statistics, reports, etc.—that could be anticipated to lead a person inclined towards violence to engage in a violent act against anyone, anywhere. Moreover, the potential victims of such violence would not, under the Government's interpretation of Exemption 7(F), need to be Americans. Under the Government's interpretation of the statute, information in a law enforcement file that might be thought capable of leading one Somali pirate to strike another Somali pirate would be exempt from disclosure under FOIA. Or, under the Government's view, photos of abuses in Darfur that are in law enforcement files and critical to obtaining protection for the victims of the Sudanese janjaweed militias would be withheld on the theory that the perpetrators of the violence might seize on the photos as an excuse to continue their campaign of rape and murder. If the boundary to the statutory exemption is the capacity of an extremist or fringe group anywhere in the world to engage in a violent act against anyone anywhere, then there is truly no boundary to the exemption at all.

Oddly, while Exemption 7(F) would, under the Government's interpretation, be extraordinarily broad, it would at the same time be extremely shallow in other respects. Exemption 7(F) applies only to records or information "compiled for law enforcement purposes." In the Government's interpretation of FOIA, the same information, picture or report that can be withheld if compiled for law enforcement purposes will be subject to disclosure if it was obtained or generated by the Government for reasons other than law enforcement, regardless of the quan-

tity of mayhem it might cause. Similarly, the Government's unbounded reading of the exemption is not tied in any way to protecting or furthering law enforcement.

The Government's reading of Exemption 7(F) is so untenable, and the decision below so clearly correct, that the Court should deny review forthwith. The Second Circuit read Exemption 7(F) in a manner that is faithful to the language, purpose and history of the statute. In contrast, the reading urged by the Government would open a gaping hole in the statute, and human rights advances and protections will be severely stymied.

The Court should deny the Government's petition for review, in light of the clarity of FOIA, the absence of any conflict, and the clearly correct decision of the Second Circuit.

ARGUMENT

A. FOIA's Mandate For Disclosure Is Intentionally Broad; Exceptions Are Narrowly Construed.

FOIA is the most prominent federal law concerning the public's right of access to information compiled and maintained by the Federal Government. Congress enacted FOIA to protect the public's interest in the free flow of government information to ensure that the people "know what their government is up to," *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772-73 (1988) (internal quotation and emphasis omitted), and "to ensure an informed citizenry, [which is] vital to the functioning of a democratic society, needed to check against corruption and to hold the [government] accountable to the governed," *NLRB v. Robbins Tire*

& Rubber Co., 437 U.S. 214, 242 (1978); *see also Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004) (describing FOIA as "a structural necessity in a real democracy").

On July 4, 1966, after years of congressional debate, President Lyndon B. Johnson signed FOIA into law, with the declaration that "'[FOIA] springs from one of our most essential principles: A democracy works best when the people have all the information that the security of the nation permits. No one should be able to pull the curtain of secrecy around decisions which can be revealed without injury to the public interest.'" White House Press Release, Statement by the President Upon Signing S. 1160 (July 4, 1966), *reprinted in* Att'y Gen.'s Mem. on the Public Information Section of the Administrative Procedures Act, at II (June 1967) [hereinafter Statement by the President Upon Signing S. 1160]. President Johnson's views of FOIA echoed those of the House report, which declared that "[t]he right of the individual to be able to find out how his Government is operating can be just as important to him as his right to privacy. . . . [FOIA] strikes a balance considering all these interests." H.R. Rep. No. 89-1497, at 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 1853, 2423.

By way of background, FOIA amended section 3 of the Administrative Procedure Act of 1946 (APA). In its original form, the APA "set forth uniform standards for government administrative actions affecting the public; it restated the law of judicial review permitting the public to appeal to the courts about wrongful administrative actions; it provided for public participation in an agency's rulemaking activities. But most important[,] it required agencies

to keep the public currently informed of their organization, procedures, and rules." H.R. Rep. No. 89-1497, at 3, *reprinted in* 1966 U.S.C.C.A.N. at 2420. However, for decades after its enactment, the APA "was being interpreted to restrict information availability" and was used as a tool for ensuring government secrecy. H.R. Rep. No. 104-795, at 7 (1996), *reprinted in* 1996 U.S.C.C.A.N. 3309, 3450. Thus, in an effort to remove "impediments to [the] public['s] access to information," Congress enacted FOIA. *Id.*

Since its enactment, Congress has amended FOIA on multiple occasions.[2] Each amendment underscored and promoted FOIA's broad policy and "'general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.'" *Dep't of the Air Force v. Rose*, 425 U.S. 352, 360-61 (1976) (quoting S. Rep. No. 89-813, at 3 (1965)). Throughout all of FOIA's amendments, Congress has not retreated from the position that, when balancing opposing interests, "[i]t is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated." S. Rep. No. 89-813, at 3 (1965), *reprinted in* Subcomm. on

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[2] Congress amended FOIA in 1974, 1976, 1986, 1996, 2002 and 2007. *See* Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561; Government in Sunshine Act of 1976, Pub. L. No. 94-409, 90 Stat. 1241; Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207; Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048; Intelligence Authorization Act of 2003, Pub. L. No. 107-306, 116 Stat. 2383 (2002); Open Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

Admin. Practice & Procedure of the Senate Comm. on the Judiciary, *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles*, S. Doc. 93-82, at 38 (1974). Thus, FOIA embodies Congress's determination of how best to balance the public's interest in access to information with the interests of the Federal Government, the interest of individuals in the protection of privacy and all other competing interests. However, Congress has never disavowed President Johnson's declaration that the "freedom of information is so vital that only the national security, not the desire of public officials or private citizens, should determine when it must be restricted." Statement by the President Upon Signing S. 1160.

As this Court has repeatedly made clear, attempts to withhold information from disclosure under FOIA are governed by the principle that disclosure is the rule, subject to specific exemptions that must be read narrowly:

> Upon request, FOIA mandates disclosure of records held by a federal agency, see 5 U.S.C. § 552, unless the documents fall within enumerated exemptions, see § 552(b). "[T]hese limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act," *Department of Air Force v. Rose*, 425 U. S. 352, 361 (1976); "[c]onsistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass," *Department of Justice v. Tax Analysts*, 492 U. S. 136, 151 (1989); *see also FBI v. Abramson*, 456 U. S. 615, 630 (1982) ("FOIA exemptions are to be narrowly construed").

Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 7-8 (2001).

The right to obtain information through FOIA has been a tremendous aid to truth-seeking even outside the United States. In Guatemala, for example, a United Nations-supported Historical Clarification Commission was established to investigate a period of internal conflict and repression that had lasted over 30 years. Although the commission "was stonewalled at every turn by [Guatemalan] military, intelligence and security officials, who refused to turn over internal files on the grounds that they had been destroyed during the war, or simply did not exist," investigators were nevertheless able to "provide some historical and judicial accountability" for events during the war by gathering information from "victims' accounts, forensic records, published human rights reports, perpetrators' testimonies and thousands of declassified U.S. documents obtained by the National Security Archive under the Freedom of Information Act . . . ."[3] The commission issued its report in early 1999 concluding, in part, that the Central Intelligence Agency's training of Guatemalan military officers in counterinsurgency and intelligence techniques "had significant bearing on human rights violations during the armed conflict."[4] In

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[3] Kate Doyle, *The Guatemalan Police Archives, National Security Archive Electronic Briefing Book No. 170* (Nov. 21, 2005), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB170/index.htm.

[4] Guatemalan Comm'n for Historical Clarification, *Guatemala, Memory of Silence: Report of the Commission for Historical Clarification, Conclusions and Recommendations* (1999), (continued)

light of that conclusion, the President of the United States declared that U.S. "support for military forces or intelligence units which engaged in violent and widespread repression of the kind described in the report was wrong . . . [a]nd the United States must not repeat that mistake."[5]

B. Photographs Are Records That Must Be Disclosed Under FOIA.

There is no dispute that the photographs at issue here are "records" subject to FOIA. As defined by FOIA, the term "record" includes "any information that would be an agency record . . . when maintained by an agency in any format, including an electronic format." 5 U.S.C. § 552(f)(2)(A). In keeping with this broad definition, the Federal Government has frequently produced photographs in response to FOIA requests.[6]

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available at http://shr.aaas.org/guatemala/ceh/report/english/toc.html.

[5] Charles Babington, *Clinton: Support for Guatemala was Wrong*, Wash. Post, Mar. 11, 1999, at A1.

[6] *See, e.g.*, National Security Archive, *Return of the Fallen, Pentagon Releases Hundreds More War Casualty Homecoming Images*, Electronic Briefing Book No. 152, Apr. 28, 2005, http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB152/index.htm (Pentagon released more than 700 photographs of the arrival ceremonies for deceased military personnel in response to FOIA requests and lawsuit); Kelly Chernenkoff, *Defense Department Releases Flurry of Photos of Botched Plane Flyover*, FoxNews.com, July 31, 2009, http://www.foxnews.com/politics/2009/07/31/defense-department-releases-flurry-photos-botched-plane-flyover (146 photos of controversial Manhattan flyover released in response to FOIA requests).

C. Photographs Have Played An Important Role In Protecting Human Rights, Here And Abroad.

For *amici* and others dedicated to the advancement of human rights, access to photographs can be particularly important in proving to a skeptical world that human rights have been abused, in galvanizing public opinion, and in moving courts to hold perpetrators accountable and legislatures to enact remedial laws. For example, the compelling photographs of the civil rights movement helped lead to the enactment of landmark civil rights laws in the 1960's:

> [On July 2] President Lyndon Johnson signed the Civil Rights Act of 1964, which outlawed discrimination at the polls and in schools, public facilities, and places of employment. By then [Charles Moore's] Birmingham photographs had become so much a part of the public memory of those events that they even received some measure of credit for the passage of the legislation. As the historian Arthur Schlesinger, Jr., later said, "The photographs of Bull Connor's police dogs lunging at the marchers in Birmingham did as much as anything to transform the national mood and make legislation not just necessary, which it had long been, but possible."

Michael S. Durham, *Powerful Days: The Civil Rights Photography of Charles Moore* 32 (1991).

Similarly, the photographs of Emmett Till's mutilated body that were published by Jet magazine in 1955 have been credited with spurring the civil rights movement in the United States, leading to the passage of the Civil Rights Act of 1957, Pub. L. No.

85-315, 71 Stat. 634.[7] Indeed, the haunting images of the murdered boy still retain their power to move the public, and recently led to the enactment of the Emmett Till Unsolved Civil Rights Crime Act of 2007, Pub. L. No. 110-344, 122 Stat. 3934.

More recently, human rights organizations have harnessed the power of pictures to advance such causes as the banning of anti-personnel landmines and cluster munitions. The use of photographic imagery played a prominent role in the adoption of the 1997 Mine Ban Treaty, an international agreement that bans antipersonnel landmines.[8] The human rights and governmental organizations that

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[7] *See* Keith A. Beauchamp, *The Murder of Emmett Louis Till—The Spark That Started the Civil Rights Movement*, http://www.black-collegian.com/African/till2005-2nd.shtml; Noah Adams, *Emmett Till and the Impact of Images—Photos of Murdered Youth Spurred Civil Rights Activism*, National Public Radio, June 23, 2004, http://www.npr.org/templates/story/story.php?storyId=1969702; Dwight D. Eisenhower Presidential Library and Museum, *Civil Rights: The Emmett Till Case*, http://www.eisenhower.archives.gov/Research/Digital_Documents/Civil_Rights_Emmett_Till_Case/EmmettTillCase.html; *see also* Statement of the Attorney General on the Proposed Civil Rights Legislation Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee 19 (Feb. 14, 1957) ("All of us here are shocked, I am sure, at cases such as that of Emmett Louis Till . . . ."), *available at* http://www.eisenhower.achives.gov/Research/Digital_Documents/Civil_Rights_Civil_Rights_Act/New%20PDFs/Statement_of_the_Attorney_General.pdf.

[8] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction art. 1 (1997), *available at* http://untreaty.un.org/English/millennium/law/disarmament/xxvi_5E.htm.

led the effort to bring about this treaty used various modes of media—film, photograph, and text—"to draw the world's attention to the scourge of landmines and call for a mine-free world."[9] A similar effort, also making extensive use of photographic images, led to the recent adoption of the Convention on Cluster Munitions.[10]

In short, the use of FOIA, and of photographs and imagery, have long played important roles in advancing the cause of human rights, at home and abroad.

D. The Government's Proposed Interpretation Of Exemption 7(F) Is Incorrect And Unworkable.

The Government here seeks to withhold the release of pictures depicting abuse of detainees in Iraq because it fears that anti-American extremists

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[9] International Campaign to Ban Landmines (ICBL), *10 Years in Force of the Mine Ban Treaty: ICBL Campaigners Celebrate in 65 Countries!* (2009), *available at* http://www.icbl.org/index.php/icbl/layout/set/print/Library/News-Articles/National-Campaigns/1March09events; *see also* Don Hubert, *Occasional Paper #42, The Landmine Ban: A Case Study in Humanitarian Advocacy* 31-32 (Thomas J. Watson Inst. for Int'l Studies 2000) ("Effective use was also made of the visual media including traveling photograph exhibits, videos highlighting the impact of landmines, and televised documentaries.").

[10] *See* Human Rights Watch, *Flooding South Lebanon*, Vol. 20, No. 2(E), at 14 (Feb. 2008), *available at* http://www.hrw.org/sites/default/files/reports/lebanon0208_1.pdf; Norwegian People's Aid, *Image Gallery on Cluster Munitions*, http://npaid.websys.no. The text of the convention is available at http://www.clusterconvention.org/downloadablefiles/ccm77_english.pdf.

will seize on these pictures as an excuse to commit (or continue to commit) acts of violence against American troops, Afghan and Iraqi personnel and civilians, and Americans generally. Certainly, Americans, Iraqis and Afghans (along with almost everyone else) have cause to be concerned about the risk of violence by extremists. FOIA, however, does not provide the authority the Government seeks.

The Government claims to have found the broad authority to withhold anything that would be disturbing to an extremist tucked away in Exemption 7(F), a provision dealing exclusively with information compiled for law enforcement purposes. On its face, this is a most unlikely place for Congress to have hidden an exception of such extraordinary breadth. The court below carefully and methodically analyzed the language, history and purpose of the statute, and concluded correctly that the law simply does not give the Government the broad power it seeks.

Indeed, if the rule were otherwise, there would be nothing left of FOIA. The Government's stated concern in this case is with certain radical Islamists, but the rule the Government proposes would apply to a virtually limitless class of potentially violent individuals and groups. Indeed, almost every governmental action related to law enforcement (and especially any governmental misdeed) can be characterized as one that is likely to be disturbing to an extremist or an extremist group that has demonstrated a propensity for violence. The list of such groups is long and varied, and covers the entire political spectrum from extreme left to extreme right. It is an unfortunate fact of modern life that

extremism does not discriminate—it would be difficult to find any race, religion, national group or cause that does not have a violent fringe element.[11]

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[11] The FBI's list of perpetrators of terrorist acts within the United States includes fringe groups and radical individuals of every type: Al-Qa'ida, American Front Skinheads, Animal Liberation Front, Anti-Communist Alliance, Antonia Martinez Student Commandos, Armed Forces of National Liberation, Armed Forces of Popular Resistance, Armed Resistance Unit, Armenian Secret Army for the Liberation of Armenia, Aryan Nations, Bashir Baesho, Benjamin Nathaniel Smith, Black Brigade, Boricua Revolutionary Front, Buford O'Neal Furrow, Carlos Martinez, Clayton Lee Waagner, Commando Rojo, Communist Workers Party, Concerned Sierra Leone Nationals, Croatian Freedom Fighters, Earth First Organization, Earth Night Action Group, Ejercito Popular Boricua Macheteros, Ejercito Revolucionario Del Pueblo, Eric Robert Rudolph, Eugenio Maria de Hostos International Brigade of the Pedro Albizu Campos Revolutionary Forces, Evan Mecham Eco-Terrorist International Conspiracy, Fuqra, Group for the Liberation of Vieques, Grupo Estrella, Guerrilla Forces of Liberation, Haitian Extremists, Hesham Mohamed Ali Hedayat, Hossein Olya, International Committee Against Nazism, International Islamic Extremists, Iranian Free Army, Iranian Patriotic Army, Islamic Extremists, Jewish Defenders, Jewish Defense League, Jewish Defense League/American Revenge Committee, June 9 Organization, Justice Commandos of the Armenian Genocide, Justice Knights of the Ku Klux Klan, Libyan Revolutionary Committee, Libyan Students, Mark Warren Sands, Mexican Revolutionary Movement, Mujahedin-E-Khalq, National Liberation Movement, Norman David Mayer, United Freedom Front, October 3, Omega 7, Organization Alliance of Cuban Intransigence, Organization of Volunteers for the Puerto Rico Revolution, Pedro Albizu Campos Revolutionary Forces, Pedro Albizu Group Revolutionary Forces, People of Omar, People's Mujahedin Organization of Iran, People's Revolutionary Commandos, Popular Liberation Army, Provisional Coordinating Committee of the Labor Self-

(continued)

Moreover, the list of potential victims is nearly as long and diverse as the list of potential perpetrators. This year alone, reported hate-related incidents in the United States have been targeted against dozens of different and disparate groups and individuals.[12]

These lists just reflect the perpetrators and victims of *domestic* incidents. Under the Government's reading of Exemption 7(F), information compiled for law enforcement purposes could be withheld from disclosure under FOIA if it could incite any person or group to commit a violent act against any person, anywhere—a "heckler's veto" without limit.

Defense Group, Puerto Rican Armed Resistance, Rashid Najib Baz, Raymond Anthony Sandoval, Red Guerrilla Resistance, Republic of Revolutionary, Revenge of the Trees, Revolutionary Commandos of the People/Ready and at War, Revolutionary Communist Party, Revolutionary Communist Youth Brigade, Revolutionary Fighting Group, Sean Michael Gillespie/Aryan Nations, Sheriff's Posse Comitatus, Spokane Bank Robbers, Timothy McVeigh, Terry Nichols, and Up the IRS, Inc. FBI, *Terrorism: 2002-2005* (2007), *available at* http://www.fbi.gov/publications/terror/terrorism2002_2005.pdf.

[12] According to information compiled by the Southern Poverty Law Center, such victims include: abortion clinics/providers, Asians, Assembly of God Church, Baptist Church, Blacks, Catholics, Chileans, Chinese, Ecuadorians, Family Life Worship Center, gay men, Greek Orthodox Church, Hispanics, homeless men, immigrants, Indians, interracial couples, Jehovah's Witnesses, Jews, Lesbians, Mexicans, Mormons, Muslims, Native Americans, police officers, Puerto Ricans, Romanians, Sikhs, Somalis, supporters of same-sex marriage, transgender persons, Unitarian Universalist Fellowship Church, and Whites. Southern Poverty Law Center, *Recent Hate Incidents in the United States* (2009), http://www.splcenter.org/center/petitions/standstrong/index.jsp.

Under the Government's reading of Exemption 7(F), photographs and other records can be withheld from disclosure that would otherwise be required under FOIA if they happen to have been compiled for law enforcement purposes, whether or not withholding the records actually furthers any law enforcement objective or is in any way connected to law enforcement. Yet, at the same time, under the Government's reading of the statute, the power to protect unspecified persons from violence at the hands of extremists that the Government claims to have found in Exemption 7(F) completely disappears if the incendiary photograph or information happens to be in a file that was not compiled for law enforcement purposes. It is inconceivable that Congress could have been so careless and capricious. The conclusion is inescapable that the sweeping authority that the Government claims to have found in Exemption 7(F) simply isn't there, and that the lower court's ruling was correct.

CONCLUSION

Congress decided that disclosure of human rights abuses—including maltreatment of detainees by our own personnel, in violation of statutory law and international treaties—is the "best disinfectant" against the repetition of such wrongs in the future. The overarching policy and structure of FOIA—mandatory disclosure, unless a specified exemption, narrowly construed, permits withholding—was embodied in the statute deliberately and for good reason.

Given the clarity of FOIA, the absence of any conflict in the lower courts, and the clearly correct

decision of the lower court in this case, the Court should deny the petition for a writ of certiorari.

Respectfully submitted.

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IN THE
Supreme Court of the United States

UNITED STATES DEPARTMENT OF DEFENSE, ET AL.,
PETITIONERS,

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 16 NEWS MEDIA ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

Amici curiae, described in Appendix A, are The Reporters Committee for Freedom of the Press and sixteen news media organizations: Advance Publications, Inc., The American Society of News Editors, The Associated Press, Cable News Network, Inc., the E.W. Scripps Company, Gannett Co., Inc., the Hearst Corporation, Military Reporters and Editors, the National Press Club, NBC Universal, Inc., the New York Times Company, the Newspaper Association of America, the Newspaper Guild-CWA, the Radio-Television News Directors Association, the Society of Professional Journalists, and The Washington Post.

This case concerns an issue critical to the public's right to hold government actors accountable for their conduct: whether the government can engage in unprecedented expansion of an exemption to the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(F), to bar release of government information when the life or safety of "any individual" could reasonably be endangered — even when such potential harm is entirely speculative.

As the outlet from which most members of the public obtain facts about government conduct, the

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[1] Pursuant to Sup. Ct. R. 37, counsel for *amici* declare that they authored this brief in total with no assistance from the parties; that no individuals or organizations other than the *amici* made a monetary contribution to the preparation and submission of this brief; that counsel for all parties were given timely notice of the intent to file this brief; and that written consent of all parties to the filing of the brief *amici curiae* (aside from those who have given general consent to all *amici*) has been filed with the Clerk.

news media has a critical interest in obtaining information that helps citizens hold government officials accountable.

SUMMARY OF ARGUMENT

The issue in this case is the simple interpretation of Exemption 7(F) to the Freedom of Information Act ("FOIA"), which protects the safety of individuals linked to law enforcement investigations. The courts below have interpreted this exemption, consistent with other federal court decisions on the matter, to require a showing that an individual meant to be protected under the law must be identifiable with "reasonable specificity" and the release of information must be "reasonably expected to endanger" that individual. *American Civil Liberties Union v. Dep't of Defense* ("*ACLU II*"), 543 F.3d 59, 71 (2nd Cir. 2008).

In this case the ACLU and other civil rights groups sought access to photographs depicting alleged abuse of detainees held by U.S. troops in Iraq and Afghanistan. The Petitioners, the U.S. Department of Defense and other government agencies, argued the photos are not required to be released because of exemptions to FOIA, specifically Exemptions 6 and 7(C) governing privacy. In what even the Second Circuit noted was an "afterthought,"[2] Petitioners then raised Exemption 7(F) which protects against harm to individuals. The privacy exemptions were essentially rendered moot when Respondents agreed to redactions of identifying features which the district and appellate courts viewed as sufficient privacy

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[2] *ACLU II*, 543 F.3d at 66.

protection under those exemptions. Petitioners maintain that Exemption 7(F) justifies withholding the photos and asks this Court to broaden the interpretation of the exemption.

The government's continued plea for the expansion of Exemption 7(F) to cover large categories of individuals based upon mere speculation of endangerment is inconsistent with the law's history and would compromise FOIA's intent, which favors disclosure and narrow interpretation of any exemptions to disclosure. *EPA v. Mink*, 410 U.S. 73, 80 (1973) (FOIA is intended to emphasize the "fullest responsible disclosure") (internal quotation omitted); *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (*quoting Dep't of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976) (stating the exemptions to FOIA must be "narrowly construed")). Exemption 7(F) does not permit the government to hide records from the public for fear of violent or retaliatory action against "any individual" without "reasonable" belief that action would occur. Here, the courts have properly found any retaliatory action to be "merely speculative" and disregarded any potential endangerment without a tie to an identifiable individual.

FOIA was enacted to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The law provides the public with the right to receive records and information from government in order to further democratic principles and allow for independent evaluation of government action. In turn, citizens can hold government actors accountable for

their actions through elections or other means. Shielding access to government information — no matter how unfavorable, embarrassing, or damning — to avoid accountability is fundamentally inconsistent with FOIA. The law does not exist to protect government actors when their misconduct reflects poorly upon government. The photos here, however "bad," are critical to the public debate over torture and the U.S. government's counterterrorism tactics. American citizens have the right to view them and evaluate for themselves whether subsequent action has resulted in appropriate accountability.

The law on release of these images is clear. To cloud that judgment with undue weight to speculative retaliation or violence to U.S. servicemen and women — a respected and admired category of individuals to all, including *amici* — would be to make bad law affecting all future Exemption 7(F) claims. The law on Exemption 7(F) is consistent, has properly been considered, and has been interpreted narrowly by the courts below. No split exists among the circuits or any lower courts as to its interpretation. The government's proposed reach of Exemption 7(F) is misdirected and would use the pretext of speculative harm to circumvent accountability.

This Court should deny Petitioner's request for review.

ARGUMENT

I. FOIA requires release of the photographs as the government has not demonstrated that disclosure would "reasonably be expected" to endanger "any individual."

FOIA was enacted to promote disclosure of government information.[3] However, Congress did not disregard the need for certain information to be withheld from the public, providing nine exemptions to the law.[4] FOIA's exemptions protect certain government records from release even when they fulfill the core purpose of the law: to encourage government disclosure of information to the public so citizens may know "what their government is up to." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772-23 (1988) (internal quotation and emphasis omitted). However, "[c]onsistent with FOIA's purposes, these statutory exemptions are to be narrowly construed." *John Doe*, 493 U.S. at 152. The district and appellate courts here considered whether the government provided sufficient justification for narrow application of exemptions to FOIA precluding release of the photographs and determined it did not.

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[3] *See* S. Rep. No. 89-813, reprinted in Freedom of Information Act Source Book, 38 (Comm. Print 1974) ("It is the purpose of the present bill to . . . establish a general philosophy of full agency disclosure unless information is exempted. . . ."); *see also Mink*, 410 U.S. at 80, *supra* Sec. I.

[4] 5 U.S.C. § 552(b)(1)-(9).

Exemption 7(F) protects law enforcement records from release to the limited extent that disclosure "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F). The appellate court has properly interpreted the "any individual" language within Exemption 7(F) to require actual identification of "individuals" rather than broadly "gesturing to the populations of two nations and two international expeditionary forces." *ACLU II*, 543 F.3d at 70. The "any individual" language has been an issue in few lower court cases. Even those that did not require identification by name stopped short, as the appellate court found, of taking the "leap of logic" required to conclude that the government need not identify any individual at all, or that it would be sufficient to identify individuals who are members of boundless populations. *See Living Rivers, Inc. v. U.S. Bureau of Reclamation*, 272 F. Supp. 1313, 1321 (D. Utah 2003) (interpreting "any individual" to protect specific, identifiable individuals —numerous, yet still identifiable — residing within certain areas of the maps at issue in the case); *see also Ctr. For Nat'l Sec. Studies v. U.S. Dep't of Justice*, 215 F. Supp. 2d 94, 108 (D.D.C. 2002), *aff'd in part and rev'd in part*, 331 F.3d 918, 925 (D.C. Cir. 2003) (holding that withholding names and other detention information regarding persons held for questioning in respect to the September 11 terrorist attacks is allowed not under Exemption 7(F) but under Exemption 7(A)).

The government insists that unidentifiable classes of persons numbering in the thousands such as "United States military and civilian personnel in

Iraq and Afghanistan"[5] should be read as "any individual." It supports this argument with declarations of high-ranking military officials who also identified broad swaths of individuals potentially facing endangerment. *ACLU II*, 543 F.3d at 71; *see also* Declaration of Director Phillip J. McGuire (Jul. 20, 2005) JA 158a, 163a (stating the release "would pose a threat to the lives and safety of *third parties*"); Declaration of Chairman Richard B. Myers (Aug. 25, 2002) JA 136a, 156a (stating the photos "must be withheld in order to protect the lives of: *members of the United States Armed forces, forces operating in cooperation with the United states*, and *contractors operating with those forces*; *U.S. officials*; *Iraqi and Afghan police and military personnel* working in coordination with our government and military forces; as well to protect against the increased likelihood of violence against *U.S. interests, personnel, and citizens world-wide.*") (emphasis added).

Here the government repeatedly failed to clearly identify "any individual" or even numerous individuals as part of a readily identifiable group who might be endangered by the release of the photographs but instead continues to assert that Exemption 7(F) should be expanded to nearly all persons everywhere at once, extending its reaches to hide records of its own misconduct behind assertions of harm to national security.[6] Rather than broaden the exemption

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[5] Petition for *Certiorari* at (I).

[6] In rejecting the expansion of Exemption 7(F) as encompassing any information that may be harmful to national security, the appellate court pointed to Exemption 1, which already to exists to protect release of information that may harm national secu-

to include any number of categories of individuals, as the government sought, the court properly, and narrowly, applied the exemption and found the government failed to meet that interpretation.

If the phrase "any individual" were to be interpreted without clear construction, covering limitless categories of individuals, it could do just as the government argues it should: protect any unforeseen person in any potential future setting from speculative harm that could be linked to release of law enforcement information. This goes squarely against the congressional intent limiting the scope of Exemption 7(F).[7] Moreover, practically speaking, this interpretation of Exemption 7(F) would swallow the rule.

The government in this case introduces an unprecedented interpretation of Exemption 7(F) that

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rity, as a "powerful reason not to construe exemption 7(F) as broadly as the defendants urge." *ACLU II*, 543 F.3d at 72. The court said the Petitioners' suggested use of Exemption 7(F) could be seen as a way to "evade[ ] the strictures and safeguards of classification" to "find shelter" in Exemption 7(F).

[7] While the 1986 amendment concerning Exemption 7(F) did expand the protection from only "law enforcement personnel" to cover "any individual," the legislative history states it was merely "slightly" modified. 131 Cong. Rec. p. S248 (daily ed. Jan. 3, 1985) (statement of Carol E. Dinkins, Deputy Attorney General); *see also* 132 Cong. Rec. p. H9462 (daily ed. Oct. 8, 1986) (statement of Rep. Glenn English) (the 1986 amendments make "only modest changes to the FOIA" and are only a "slight" expansion of Exemption 7(F)). The modification still required clear identification of "any individual."

would allow for its actions — here, its own misconduct and misconduct of its agents — to be covered by what amounts to blanket "classification" as the appellate court noted. *ACLU II*, 543 F.3d at 83. As the appellate court also pointed out, "it is unlikely to be the last" time the government would use such an argument to justify withholding information the public has a clear right to see under the law of this exemption. Exemption 7(F) was not enacted to protect government actors by cloaking their action when it is so atrocious that it provokes speculative fears of violent retribution.

The appeals court stated the standard for justifying withholding under Exemption 7(F) requires that the government identify "at least one individual with reasonable specificity" and establish that "disclosure of the documents could reasonably be expected to endanger that individual." *ACLU II*, 543 F.3d at 71. There is no question that "third parties" and the millions of individuals who could potentially be impacted by such release throughout the "U.S. Armed forces" and "worldwide" would not meet the specificity standard for "any individual" established by the appellate court and supported by every other court's interpretation of Exemption 7(F) as well as congressional intent.

II. The images at issue depict government conduct and promote accountability in furtherance of FOIA principles.

FOIA was enacted to break down the wall of government secrecy and promote accountability. This Court has held that FOIA makes "crystal clear the congressional objective, to pierce the veil of adminis-

trative secrecy and to open agency action to the light of public scrutiny." *Rose*, 425 U.S. at 361 (internal quotes omitted). The law enables citizens to act as watchdogs; this Court noted that FOIA "seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *EPA v. Mink*, 410 U.S. 73, 80 (1973). Further, FOIA is crucial in promoting an informed citizenry — a virtue vital to a functioning democracy and to preventing government corruption. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

FOIA is the mechanism that provides the American people with accurate information about their government. To truly hold the government accountable for its actions, citizens must be allowed to evaluate the "best evidence" of what occurred, in the words of the district court. *American Civil Liberties Union v. Dep't of Defense* ("*ACLU I*"), 389 F. Supp. 2d 547, 578 (S.D.N.Y. 2005). The photographs at issue here provide concrete, first-hand evidence of alleged torture that occurred at the hands of U.S. troops in Iraq and Afghanistan. They are part of the historical record of those wars and must be made available to the public.

Images convey matters of importance in a unique way. Visual images are more searing than words. They tell an entire story instantly and can be so powerful as to call people to action. Just as the government speculates the photos in this case will call for instant anti-U.S. retaliation, relying on evidence

that actually undermines its claim,[8] so too could they call for American citizens to act just as FOIA intends — by requiring accountability for the action depicted in the photographs' contents. FOIA was not enacted to protect against retaliation for potentially illegal, immoral, or simply embarrassing action taken by government; it exists to shed light on that action and allow citizens to evaluate whether subsequent action was appropriate and whether actors were held accountable, and to provide a yardstick with which to measure improvement in such action in the future.

Accurate information is one of the best tools to evaluate any series of decisions or actions. When provided with truthful information about government, citizens can best evaluate the choices their leaders have made and hold them accountable. The news media is often the link between accessing important government information such as this and providing it to the public — the "fourth estate" is the surrogate for the public in cases such as this. *Richmond Newspapers, Inc. v. Virginia*, 48 U.S. 555, 573

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[8] The frequency of violent incidents in Iraq in 2004 was actually higher in the first weeks of April than in the 14 weeks after the Abu Ghraib scandal broke April 28 when photos were aired on "60 Minutes II" and were later posted online by *The New Yorker* magazine. "Measuring Stability and Security in Iraq," Department of Defense Report to Congress (Dec. 2008). Additionally, U.S. troop deaths from enemy fire were also much higher before the photos appeared in public: 126 in April 2004 compared with 63 in May and 37 in June 2004. Department of Defense Personnel and Procurement Statistics, U.S. Military Casualty Information — Operation Iraqi Freedom (Aug. 1, 2009) *available at*: http://siadapp.dmdc.osd.mil/personnel/CASUALTY/castop.htm.

(1980). Releasing these images to the public so they can see for themselves the actions taken by the government on their behalf and determine what, if any, accountability may be warranted is the right thing to do — both considering FOIA policy and the interpretation of the law.

CONCLUSION

Exemption 7(F) properly protects from release law enforcement information that can "reasonably be expected" to endanger "any individual." The government has failed to link any identifiable individual with the harm it alleges would occur upon release of the photographs in this case.

The release of the photographs is required under Exemption 7(F). More than that, their release will inform and educate the public, and spark debate about the causes and forces that led to the breakdown of command discipline at Abu Ghraib prison and other American-run facilities. Providing citizens with information on government action is the very purpose that FOIA is intended to advance.

Amici share the Government's concern over the safety of American citizens and troops; however, the government's misdirected effort to undermine FOIA by expanding the reach of Exemption 7(F) far beyond Congressional intent and court interpretation so as to hide its own misconduct from the public and preclude accountability to those it governs is fundamentally counter to the principles of FOIA and democracy and has properly been rejected below.

Respectfully submitted,

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APPENDIX A

Descriptions of *amici*:

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance, and research in First Amendment and Freedom of Information Act litigation since 1970.

Advance Publications, Inc., directly and through its subsidiaries, publishes over 25 magazines with nationwide circulation, daily newspapers in over 20 cities, and weekly business journals in over 40 cities throughout the United States. These include The New Yorker, Vanity Fair, and Wired. It also owns many internet sites and has interests in cable systems serving over 2.3 million subscribers.

With some 600 members, ASNE is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to the American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922, as the American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and credibility of newspapers.

The Associated Press is a global news agency organized as a mutual news cooperative under the New York Not-for-Profit Corporation Law. AP's embers include approximately 1,500 daily newspapers and

5,000 broadcast news outlets throughout the United States. AP has its headquarters and main news operations in New York City and maintains bureaus in 240 cities worldwide. AP news reports in print and electronic formats of every kind reach a subscriber base that includes newspapers, broadcast stations, news networks and online information distributors in 121 countries.

Cable News Network, Inc. ("CNN"), a division of Turner Broadcasting System, Inc., a Time Warner Company, is the most trusted source for news and information. Its reach extends to nine cable and satellite television networks; one private place-based network; two radio networks; wireless devices around the world; CNN Digital Network, the No. 1 network of news Web sites in the United States; CNN Newsource, the world's most extensively syndicated news service; and strategic international partnerships within both television and the digital media.

The E.W. Scripps Company is a diverse media enterprise with 18 daily newspapers and numerous weekly publications reaching approximately 1 million readers, nine broadcast television stations, five national cable networks that reach more than 90 million households, an electronic commerce and interactive media division and licensing and syndication division.

Gannett Co., Inc. is an international news and information company that publishes 84 daily newspapers, including USA TODAY, and nearly 850 non-daily publications across the US. The company also operates 23 TV stations and over a 100 websites that

are integrated with its publishing and broadcasting operations.

The Hearst Corporation is a diversified, privately held media company that publishes newspapers, consumer magazines, and business publications. Hearst's major interests also include ownership of 29 broadcast stations which reach a combined 18 percent of U.S. viewers; interests in several cable television networks; Internet businesses; and a leading newspaper features syndicate.

Military Reporters & Editors, Inc. is a not-for-profit corporation consisting of more than 150 journalists, journalism educators, and others from around the country involved in reporting on military, national security and homeland defense issue. Military Reporters & Editors Inc. exists to advance public understanding of the military, national security and homeland defense; to educate and share information with its members and the public on best practices, tools and techniques for such coverage; to represent the interest of working journalists to the government and military; and to assure that journalists have access to places where the U.S. military and its allies operate. Its members heavily rely on public records and proceedings to inform themselves and the public about these issues.

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,500 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events including news conferences, luncheons, and panels, and more than 250,000 guests come through its doors.

NBC Universal, Inc., is one of the world's leading media companies. NBC Universal owns and operates the NBC television network, the Spanish-language network Telemundo, NBC News, television stations, and several news and entertainment networks, including MSNBC and CNBC. NBC News produces programs including the Today show, NBC Nightly News with Brian Williams, Dateline, and Meet the Press.

The New York Times Company is the publisher of The New York Times, the International Herald Tribune, The Boston Globe, and 15 other daily newspapers. It also owns and operates WQXR-FM and more than 50 websites, including nytimes.com, Boston.com and About.com. The New York Times maintains a bureau in Baghdad and, like the Company's other newspapers and broadcast stations, has actively covered the wars in Iraq and Afghanistan.

The Newspaper Association of America is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. Its members account for nearly 90 percent of the daily newspaper circulation in the United Sates and a wide range of non-daily newspapers. One of NAA's key strategic priorities is to advance newspapers' First Amendment interests, including the ability to gather and report the news.

The Newspaper Guild - CWA is a labor organization representing more than 30,000 employees of newspapers, newsmagazines, news services and related media enterprises. Guild representation comprises, in the main, the advertising, business, circulation, editorial, maintenance and related departments of these media outlets. The Newspaper Guild

is a sector of the Communications Workers of America. As America's largest communications and media union, representing over 700,000 men and women in both private and public sectors, CWA issues no stock and has no parent corporations.

The Radio-Television News Directors Association is the world's largest and only professional organization devoted exclusively to electronic journalism. RTNDA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTNDA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

The Washington Post is a leading newspaper with a nationwide daily circulation of over 647,000 and a Sunday circulation of over 878,000.

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